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## Just Environmentalism

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*Thirty years ago, the environmental justice movement emerged as a powerful critique of traditional environmentalism, which had largely ignored the distribution of environmental harms and the ways in which those harms were concentrated on the poor and communities of color. This Article calls for a similarly groundbreaking reimagination of both mainstream environmental policy and environmental justice: we argue that, to truly embrace justice, environmentalists must take account, not only of the ways that environmental harms uniquely impact vulnerable populations but also of the costs that environmental protection imposes on the most vulnerable among us.*

*In this Article, we contend that both mainstream environmentalism and environmental justice have taken inadequate account of the costs and harms that environmental protection imposes on the vulnerable, particularly the poor and communities of color. Drawing on examples from a wide variety of contexts—from the formation of national parks, to the protection of endangered species, to regressive environmental taxes and regulations, to net metering policies that promote solar power—we demonstrate that there are many instances in which environmental*

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*protection and social justice arguably go head-to-head rather than hand-in-hand. We suggest that environmental literature has largely ignored these situations. Scholars have not adequately identified or theorized principles to guide consideration or mitigation of the harms that come when we protect an endangered species, restrict resource extraction, designate areas with protected status, or take other steps in the name of environmental conservation and protection.*

*We then make the case for pursuing what we call “just environmentalism”—grappling with what procedural and distributive justice may require when an environmental good comes at a disproportionate cost to the poor or communities of color. We do not advocate for less rigorous environmental protection, but for a more just consideration of that protection’s costs. The paper seeks to launch a robust scholarly conversation about the issues it identifies and the questions it raises, with particular focus on the ways in which just environmentalism presents unique challenges beyond those considered by traditional environmental justice. Wrestling with these difficult challenges is necessary, we argue, not only for the pursuit of justice but also for continued environmental progress in our deeply divided country.*

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## I. INTRODUCTION

In April 2010, the Deepwater Horizon Well blew, setting off what would become the largest toxic spill in history. Nearly five million barrels of oil would ultimately make its way into the Gulf of Mexico. The oil would spread over 68,000 square miles of ocean<sup>1</sup> and blacken more than 1,300 miles of coastline, much of that in Louisiana.<sup>2</sup>

Understandably, the spill angered the country. Louisianans felt the impact immediately. In addition to a polluted environment, the spill directly interfered with the ability of many to make a living. The spill damaged marshes, mangroves, sea floors, and seashores, which meant, in turn, that it damaged wildlife, fisheries, and sea life—such as shrimp, crabs, and oysters—that many relied upon for food and income.

In mid-June 2010, President Obama spoke from the Oval Office and promised the nation that he would act decisively to respond to the

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1. See Elliott A. Norse & John Amos, *Impacts, Perception, and Policy Implications of the Deepwater Horizon Oil and Gas Disaster*, 40 ENVTL. L. REP. 1058, 1065 (2010).
  2. See Brian Clark Howard, *BP Oil Spill Trashed More Shoreline than Scientists Thought*, NAT'L GEOGRAPHIC (Apr. 20, 2016), <http://news.nationalgeographic.com/2016/04/160420-bp-oil-spill-shoreline-affected-deepwater-horizon-anniversary> [<http://perma.cc/PDT3-WXFY>].

disaster.<sup>3</sup> The following month, about 15,000 people packed into the Cajundome on the campus of the University of Louisiana-Lafayette for what organizers called a “Rally for Economic Survival.”<sup>4</sup> Local politicians, including Governor Bobby Jindal, drew raucous applause as they demanded increased consideration of the *economic*, rather than the environmental, plight of Louisianans.<sup>5</sup>

Surprisingly, however, the demands for economic justice were not made by those reliant on harvesting wildlife, fish, or shellfish. The spill had already decimated these resources and legal action was underway. Indeed, under pressure from the White House, British Petroleum (BP) had already agreed to make some sort of reparations for these losses, and—given the environmental devastation spreading in the region—reparations were the only hope to salvage the livelihoods decimated by the spill.<sup>6</sup>

As it turned out, the demands for economic justice were not even primarily directed at BP; instead, they were aimed at President Obama. But why? The Obama Administration had implemented a temporary drilling moratorium in the area to allow the government to better assess the risk of not only the Deep Horizon Well but also thousands of other wells—both drilled and planned—in the area. On the day of the Cajundome rally, t-shirts, banners, and signs proclaimed “Drill Baby Drill” and “No Moratorium.”<sup>7</sup>

It is no surprise that many associate environmental protection measures, such as the drilling moratorium, with economic consequences, at times even dire consequences. Yet, environmentalists often resist, ignore, or dismiss this connection, even when the economic consequences of environmental protection are obvious and even when those consequences fall hardest on the poor and vulnerable. While the forces aligned with economic production and resource extraction have long

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3. President Barack Obama, Address to the Nation on the BP Oil Spill (June 15, 2010) (transcript available at <https://www.reuters.com/article/us-oil-spill-obama-text/full-text-of-president-obamas-bp-oil-spill-speech-idUSTRE65F02C20100616> [<https://perma.cc/7ADQ-JCDH>]).

4. Associated Press, *Deepwater Drilling Moratorium Targeted by Rally in Lafayette*, NOLA (July 21, 2010), [http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/07/deepwater\\_drilling\\_moratorium\\_7.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2010/07/deepwater_drilling_moratorium_7.html) [<http://perma.cc/R8XL-AYUV>].

5. *See id.*

6. *See id.*

7. *Id.*

criticized environmental regulation and regulators—often strategically—for killing jobs, those inclined to promote and defend environmental protection have often been less willing to grapple with the connection between the environment and the economy and, particularly, those economic impacts of environmental protection that implicate social justice.

While there are certainly many reasons that most environmental literature gives short shrift to social justice when social justice goes head-to-head with environmental protection, the most obvious reason is that, unsurprisingly, this scholarship often incorporates a normative bias toward environmental protection as an overriding value in the hierarchy of values. Social justice is thus touted in the environmental justice literature primarily when it aligns with, and serves the aims of, environmental protection. Consider the environmental literature most explicitly focused on the intersection of social justice and environmental policy—the literature on environmental justice. That literature wrestles with a wide array of important and contested issues. What harms count?<sup>8</sup> What populations count as communities of concern?<sup>9</sup> And, what are the

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8. See, e.g., Craig Anthony (Tony) Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 11 (1998) (explaining that in the environmental justice literature “[t]here is confusion about the exact nature of environmental harms or burdens that are distributed inequitably” and summarizing the literature); Michael Greenberg, *Proving Environmental Inequity in Siting Locally Unwanted Land Uses*, 4 RISK: ISSUES HEALTH & SAFETY 235, 236-38 (1993) (asserting that pertinent harms encompass health risks, environmental contamination, property devaluation, and social or political stresses).
  9. See, e.g., Vicki Been, *Analyzing Evidence of Environmental Justice*, 11 J. LAND USE & ENVT'L. L. 1, 21 (1995) (concluding that determining vulnerability to environmental injustice involves intersectional consideration of multiple factors, such as class, race, and education); Anthony R. Chase, *Assessing and Addressing Problems Posed by Environmental Racism*, 45 RUTGERS L. REV. 335 (1993) (discussing environmental justice through the lens of racism); Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 32-34 (1995) (discussing environmental justice as a problem of race and economic class); Greenberg, *supra* note 8 at 236-38 (asserting that vulnerable populations include not only racial and ethnic minorities but the young and the elderly); Robert F. Housman, *The Muted Voice: The Role of Women in Sustainable Development*, 4 GEO. INT'L ENVT'L. L. REV. 361, 365-72 (1993) (discussing environmental harms women face in agricultural labor).

appropriate roles of procedural justice and substantive justice?<sup>10</sup> While many of the most fundamental building blocks of a theory of environmental justice remain in dispute, one issue that has received only scant attention is what to make of the cases in which environmental protection and social justice genuinely conflict.

In this Article, we take a hard look at those cases in which environmental protection and social justice go head-to-head instead of hand-in-hand.<sup>11</sup> Put in terms of substantive justice, we focus on the economic externalities that society's pursuit of environmental protection imposes on the poor and vulnerable. We argue that without full and careful consideration of how environmental protection affects the poor and the vulnerable, we will never be able to achieve what we call *just*

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10. See, e.g., Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1068-84 (1993) (expanding on legislative means of achieving distributive justice as it pertains to the placement of locally unwanted land uses); Sheila Foster, *Review Essay: Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 746-49 (1993) (discussing distributive environmental justice); Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10681, 10683-702 (2000) (discussing environmental justice according to four traditional notions of justice: distributive justice, procedural justice, corrective justice, and social justice).
  11. One might object to this framing on the grounds that environmental protection is a necessary component of social justice and thus that environmental protection and social justice cannot truly conflict. Of course, environmental justice can often be usefully conceived as a subset or component of social justice. For example, if the government shutsters a highly polluting factory in a low-income neighborhood, that action might promote social justice by improving the residents' health; of course, it may also impede social justice by depriving those same residents of their well-paying jobs at the factory. In these situations, then, the tension between environmental protection and economic concerns might well be described as a conflict between environmental protection and other (broader) social justice concerns. In many of our starker examples, however, the costs of environmental protection or conservation are concentrated on the poor and vulnerable, while the benefits to those communities of concern are attenuated or even absent. For example, the expulsion of native tribes from newly formed national parks can hardly be said to have promoted social justice. In such cases, it is most accurate to say that environmental protection and social justice interests conflict.

*environmentalism*.<sup>12</sup> It is our hope that a more just environmentalism may produce more enduring environmental protection measures and build a broader-based consensus for meaningful environmental protection.

Examples of these sorts of conflicts between the environment and social justice are familiar; indeed, these apparently zero-sum conflicts permeate many of the most riveting narratives of environmental and natural resource law: industries forced to shed jobs or even close their doors when confronted with new environmental regulations; resource extractors—loggers, irrigators, fishers—pitted against environmental and resource protection; indigenous and other local communities restricted from and sometimes pushed out of protected areas. Thus, we see, for example, more stringent clean air regulations not only shuttering inefficient plants but also putting many of their employees out of work. We see endangered predators pitted against ranchers and river ecosystems against farming communities. We see the protection of tropical forests,

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12. While the concepts underlying what we have labeled *just environmentalism* are not completely absent from the environmental literature, its presence is spotty at best. Additionally, no other scholarly work within this literature has conceived of this class of problems in this way. For legal literature discussing what we conceive of as cases of just environmentalism, see Marcilynn A. Burke, *Klamath Farmers and Cappuccino Cowboys: The Rhetoric of the Endangered Species Act and Why It (Still) Matters*, 14 DUKE ENVTL. L. & POL'Y F. 441 (2004); Maxine Burkett, *Just Solutions to Climate Change: A Climate Justice Proposal for a Domestic Clean Development Mechanism*, 56 BUFF. L. REV. 169 (2008) (discussing domestic climate change justice); Holly Doremus & A. Dan Tarlock, *Fish, Farms, and the Clash of Cultures in the Klamath Basin*, 30 ECOLOGY L.Q. 279 (2003) (discussing the clash of cultures between farmers, environmentalists, and Indians in the Klamath Basin); Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. C.R.-C.L. L. REV. 213 (2018) (discussing conflicts between national park designations and tribal interests); John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980); James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 ENVTL. L. 1 (2001); Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473 (2003); Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625 (2007) [hereinafter Tsosie, *Environmental Justice*]; Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133 (2012); and Tim Findley, *Making Monuments, Taking Towns*, RANGE (2001), [http://www.rangemagazine.com/archives/stories/summer01/making\\_monuments.htm](http://www.rangemagazine.com/archives/stories/summer01/making_monuments.htm) [<http://perma.cc/JD58-FSUV>].

which serve as important greenhouse gas sinks, making life more difficult for local people, including indigenous people, who rely on accessing these forests for food, shelter, cultural and religious traditions, and livelihoods.

To be sure, there are a great many examples of environmental measures achieving remarkable protections and improvements for the lives of vulnerable people. Indeed, the environmental justice movement has made great strides in addressing the disproportionate harms that burden society's most vulnerable. Without discounting that progress, we assert that the work of environmental justice would be well served by expanding the discussion of its aims to more fully anticipate and address the negative externalities that environmental protection imposes on vulnerable communities.<sup>13</sup> Particularly when the poor or otherwise disadvantaged bear a disproportionate share of the burdens, we hear pleas for fairness and for a more equitable distribution of the burdens of environmental protection: these are pleas for just environmentalism.

Confronting conflicts between environmental protection and social justice is not comfortable or easy, but it is important. Because there has not yet been sustained and systematic attention paid to these complex questions, what justice means in the context of environmental protection or natural resource preservation is an open and neglected question.

Given that environmental justice appeared first as a social movement and only later as a field of study, it is hardly surprising that conflicts were initially glossed over. Environmental justice's original purpose was animated by the ennobling aim of protecting society's most vulnerable and building empowering coalitions to achieve that aim. Those set on building coalitions sought areas of cooperation with the environmental movement, not conflict.

Moreover, for people who care about the environment, it is often far more difficult to confront issues of justice in the context of environmental protection than in the context of environmental harms. As traditionally

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13. We acknowledge the economic studies that have demonstrated that environmentally protective statutes and regulations are not net "job-killers" and that such protective measures ultimately contribute to the overall health and prosperity of the nation. But particular communities do sometimes bear the brunt of job reductions and plant closures in certain regulated industries, even if in the country as a whole, those jobs losses are offset by new jobs related to clean-energy or other environmentally protective measures. *See, e.g.,* Alana Semuels, *Do Regulations Really Kill Jobs?*, ATLANTIC (Jan. 19, 2017), <http://www.theatlantic.com/business/archive/2017/01/regulations-jobs/513563> [<http://perma.cc/7FW6-9DMZ>].



conceived, environmental justice places the environmentalist on the same side as the poor, standing together against what are very often narrow economic interests. Standing beside the poor and fighting against some scheme of environmental destruction may seem intuitively right. It is much less comfortable for environmentalists to consider what should be done in those cases—and there are many of them—when environmental protection creates or exacerbates negative economic and social impacts on the vulnerable.

Even when the literature on environmental and natural resource law focuses more explicitly on the potential conflict, such as the literature on sustainable development, the central project is trying to find balance between the environment on one hand, and economic development on the other. The literature often neglects questions about the winners and losers that striking such a balance is sure to produce. Acknowledging that there are both costs and benefits inherent in sustainable development, we are left with much important thinking to do about how those costs and benefits are to be distributed. Many of the important questions that arise resonate with the existing environmental justice literature. Whose harms should count? What constitutes harm? What does justice look like in this context?

The failure to recognize and account for conflicts between economic justice and environmental protection inhibits us from finding ways to bridge these divides. While these conflicts present difficult questions, there are often ways to avoid conflicts or at least mitigate them. We might find ways, for example, to allow the vulnerable who might bear losses not only to provide input and give voice to their concerns but also to generate possible solutions. We might develop decision-making structures designed to respect the autonomy of those harmed or at least find potential shared compromise. We might also find ways to craft solutions that protect the environment while also providing remedies to the vulnerable harmed by that protection.

In many instances, environmental protection ought to win out when faced with competing claims of social justice, but it should not win out without at least considering costs and harms to vulnerable communities and without attempting to minimize and mitigate those costs. There will also be cases in which the costs of environmental protection are simply too high because, for example, they are disproportionately shouldered by vulnerable communities, or come at the cost of other fundamental values, such as the self-determination of indigenous peoples.

Thus, we believe there are cases where social justice ought to be prioritized above environmental protection and vice-versa. Where the line ought to be drawn and how these conflicting values ought to be weighed

are difficult questions, which this paper raises in an effort to invite the difficult conversations that must follow. Finding answers to these hard questions is not possible until we allow ourselves to ask them.

Of course, in considering what just environmentalism ought to look like, we do not write on a blank slate. Conflicts between economic and environmental concerns are hardly a new challenge. Thus, we build on work done by numerous scholars in a variety of fields who have attempted to address these issues through a number of different frameworks. We begin, in Part II, by providing a brief overview of the relevant literatures. In addition to laying out major themes in the environmental justice literature relevant to our project, we provide a cursory survey of some of the other literatures and themes present in multiple fields that relate to just environmentalism.

In Part III, we provide examples of just environmentalism problems. In this Part, the examples we provide are intended to illustrate the breadth of the challenge. To do this we draw on examples relevant to diverse parts of the world and in a wide range of policy areas. We also attempt to categorize some of the types of issues that frequently arise.

After addressing the scope and variety of just environmentalism problems, in Part IV we make the normative argument that we ought to consider and often address social justice concerns that result from environmental protection. This Part evaluates the reasons that just environmentalism deserves our attention. In addition to ethical arguments, we consider the practical politics of pursuing environmental progress. We also address potential objections to just environmentalism.

Building on the assessment that just environmentalism is a challenge worth pursuing, in Part V, we lay out some of the most central questions facing us if we seriously pursue just environmentalism. Given the significant shift it will take to truly tackle the social justice implications of environmental protection, this Part is designed primarily to launch the conversations that need to occur. We include observations, raise questions, consider some preliminary applications of just environmentalism, and identify potential stumbling blocks.

In Part VI, we conclude.

## II. ENVIRONMENTAL JUSTICE AND RELATED LITERATURES AND THEMES

In this Part, we begin with the literature on environmental justice. Here, we lay out some of the major questions explored in the environmental justice literature and discuss how our project fits within and extends that literature. We also provide a brief overview of other literatures relevant to our project, all of which have grappled, at least in

part, with the disproportionate burdens that environmental protection may impose on the vulnerable. These include sustainable development, just transition, the commons, and the environment and the poor.

#### A. *Relevant Themes in the Environmental Justice Literature*

Environmental justice is the marriage of the environmental ethic and social justice; it lives at the intersection of environmental and social justice concerns and embodies the simultaneous pursuit of both social justice and environmental protection. Traditionally, environmental justice focuses on the costs that environmental pollution and degradation impose on the most vulnerable among us—the poor and communities of color. Born first as a social movement, environmental justice later grew into an area of robust academic inquiry.<sup>14</sup>

While Professor Jedediah Purdy has persuasively argued that the connection between social justice and environmental protection has had a storied past extending well beyond when most came to see it as a social movement,<sup>15</sup> the connections between social justice and environmental protections began to receive much more sustained attention from social

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14. This is not to say that the idea of pursuing environmental protection along with social justice had never occurred to anyone, just that it did not become a field of study until after it appeared and made headway as a social movement. Many of those who contributed to the literature, particularly early on, are those who helped further the social movement.
  15. See Jedediah Purdy, *Environmentalism Was Once a Social-Justice Movement: It Can Be Again*, ATLANTIC (Dec. 7, 2016), <http://www.theatlantic.com/science/archive/2016/12/how-the-environmental-movement-can-recover-its-soul/509831> [<http://perma.cc/W5DT-5SBU>]. In his essay, Professor Purdy urges the post-1970s environmental movement—what environmental justice advocates call “mainstream environmentalism”—to embrace its roots in an older, “long environmental-justice movement,” in which “for more than a century, activists and scholars have been engaging the themes of fairness, inequality, and political and economic power in the human environment.” *Id.* He contends that “[f]or decades, environmentalism and what we now call environmental justice were deeply intertwined. Care for the earth and for vulnerable human communities belonged together. Empowering workers, protecting public health, and preserving landscapes were part of a single effort.” *Id.* Purdy concludes with a call to action: “Maybe it’s time to reclaim that older environmental movement, and see that it was an environmental-justice movement all along.” *Id.*

and environmental advocates beginning in the 1980s. At that time, the United Church of Christ published a report that highlighted the connection between race and the siting of toxic waste landfills.<sup>16</sup> The report itself grew out of a losing battle of community organizers in Warren County, North Carolina (a poor, black community), to stop the construction of landfills to hold polychlorinated biphenyls (PCBs).<sup>17</sup> As more and more communities of color began to confront similar conditions in their own neighborhoods, the environmental justice movement took shape as a “loosely connected” network of “hundreds of grassroots organizations” challenging the “unequal exposure to ecological hazards” that “[p]lagu[es] people of color where they ‘work, live, and play.’”<sup>18</sup>

Since that time, environmental justice has become a mainstay in discussions about environmental policy. It has been the subject of a long-standing presidential executive order,<sup>19</sup> numerous lawsuits,<sup>20</sup> the work of

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16. Comm’n for Racial Justice, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites*, UNITED CHURCH CHRIST (1987), [http://d3n8a8pro7vbm.cloudfront.net/unitedchurchofchrist/legacy\\_url/13567/toxwrace87.pdf](http://d3n8a8pro7vbm.cloudfront.net/unitedchurchofchrist/legacy_url/13567/toxwrace87.pdf) [<http://perma.cc/6Q5H-SZYD>].
  17. U.S. COMM’N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE, 13-14 (Oct. 2003), <http://www.usccr.gov/pubs/envjust/ej0104.pdf> [<http://perma.cc/37MT-X4GN>].
  18. Daniel Faber, *A More ‘Productive’ Environmental Justice Politics: Movement Alliances in Massachusetts for Clean Production and Regional Equity*, in ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM: THE SOCIAL JUSTICE CHALLENGE TO THE ENVIRONMENTAL MOVEMENT 135, 135 (Ronald Sandler & Phaedra C. Pezzullo eds., 2007) [hereinafter ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM]. More specifically, the movement focused on “(1) higher concentrations of destructive mining operations, polluting industrial facilities and power plants; (2) greater presence of toxic waste sites and disposal/treatment facilities, including landfills, incinerators, and trash transfer stations; (3) severe occupational and residential health risks from pesticides, lead paint, radiation waste, and other dangerous substances; and (4) lower rates of clean-up and environmental enforcement of existing laws.” *Id.*
  19. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994) (requiring that each federal agency “make achieving environmental justice part of its mission” and establishing an interagency Federal Working Group on Environmental Justice).

community activists and nonprofit organizations, and a substantial body of scholarship. The environmental justice movement has made major strides in exposing the myriad ways in which poor communities and communities of color have borne a shockingly disproportionate burden of the harms generated by environmental destruction. From the concentration of dirty power plants and toxic waste dumps in low-income communities to the vulnerability of many tribal communities and low-income communities of color to the devastating effects of sea level rise and other consequences of climate change, environmental justice has focused our attention on how the environmental costs of economic expansion have been externalized to, and concentrated on, the socially disadvantaged. Environmental justice has helped to identify and to address many of these stark inequities.

While many within the environmental movement have embraced the notion of environmental justice, most of the basic premises of environmental justice are areas of inquiry and dispute. Environmental theorists and scholars grapple with profound questions including whether and to what extent justice in this context is distributive (e.g., a community bearing a disproportionate share of the burden of undesirable development),<sup>21</sup> whether and to what extent justice amounts to

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20. See, e.g., Michael A. Fletcher, *A Neighborhood of Oil Pits, Death*, WASH. POST (May 1, 1997), <http://www.washingtonpost.com/archive/politics/1997/05/01/a-neighborhood-of-oil-pits-death/8d5da15f-f049-4666-bf30-5ca079af89ac> [<http://perma.cc/464A-ENDA>] (describing cases alleging “environmental racism,” including the “first environmental racism suit... filed in Houston in 1979 by residents of a predominantly black neighborhood trying to block a new landfill” and a later suit brought by residents of Kennedy Heights, Texas, against Chevron alleging that its predecessor company specifically marketed land it knew was contaminated to African-American home buyers); Sam Howe Verhovek, *Racial Rift Slows Suit for “Environmental Justice,”* N.Y. TIMES (Sept. 7, 1997), <http://www.nytimes.com/1997/09/07/us/racial-rift-slows-suit-for-environmental-justice.html> [<http://perma.cc/77EZ-ZZTS>] (detailing the Kennedy Heights case); see also *Padres Hacia Una Vida Mejor v. Jackson*, 922 F. Supp. 2d 1057, 1060 (E.D. Cal. 2013), *aff’d sub nom.*, *Padres Hacia Una Vida Major v. McCarthy*, 614 F. App’x 895 (9th Cir. 2015) (attempting to compel the EPA to act on a Title VI complaint that California agencies were discriminating against poor Latino communities in the siting of toxic waste disposal dumps).
  21. See Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994) (“To the greatest extent practicable and permitted by law... each Federal agency shall make achieving environmental justice part of its mission by identifying

procedural protection (e.g., increased transparency and participation);<sup>22</sup> which communities count as communities of concern (e.g., the poor or racial minorities);<sup>23</sup> what counts as harm (e.g., siting of undesirable land uses, distribution of risk, or distribution of environmental amenities like parks);<sup>24</sup> and why distributional inequities come about (e.g., racial animus, markets, political institutions working for some interests and not others, or desire for economic growth in distressed communities).<sup>25</sup>

Despite the wide range of disputed questions within the environmental justice literature, one potential facet of environmental justice that has received much less attention is the one we now explicitly explore: how to address the disproportionate harms that environmental protection—rather than environmental degradation—imposes on vulnerable communities.<sup>26</sup> Indeed, much of the literature on environmental justice assumes—often explicitly—that environmental

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and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States . . .”).

22. See Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CALIF. L. REV. 775, 828-33 (1998).
23. See David Naguib Pellow & Robert J. Brulle, *Power, Justice, and the Environment: Toward Critical Environmental Justice Studies*, in POWER, JUSTICE, AND THE ENVIRONMENT 1, 13 (David Naguib Pellow & Robert J. Brulle eds., 2005).
24. See Jennifer R. Wolch et al., *Urban Green Space, Public Health, and Environmental Justice: The Challenge of Making Cities “Just Green Enough,”* 125 LANDSCAPE & URB. PLAN. 234, 234-244 (2014).
25. See Foster, *supra* note 22, at 791-807.
26. Similarly, most working definitions and applications of environmental justice focus solely on the harms of environmental degradation. The EPA, for example, defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.” *Learn About Environmental Justice*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/environmentaljustice/learn-about-environmental-justice> [<http://perma.cc/2FXV-N3PQ>]. The definition goes on to explain that “[f]air treatment means no group of people should bear a disproportionate share of the *negative environmental consequences* resulting from industrial, governmental and commercial operations or policies.” *Id.* (emphasis added).

justice involves issues in which environmental protection necessarily advances, rather than potentially impedes, social justice goals.<sup>27</sup> Certainly, one can find early environmental justice advocates who focused explicitly on these potential conflicts,<sup>28</sup> as well as echoes of those early strains in later environmental justice scholarship<sup>29</sup> and ongoing grassroots activism. Additionally, there are a number of scholars who have focused on conflicts between social justice and environmental protection in a number of individual contexts,<sup>30</sup> particularly in the arena of climate change justice,<sup>31</sup>

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27. For example, Jedediah Purdy identifies three major criticisms that “environmental justice scholars and advocates” level against “what they call mainstream environmental law”: the movement’s inattention to the distribution of “environmental harms and benefits,” the movement’s focus on preserving the “beautiful outdoors,” rather than the workplace and urban areas where most people—especially the poor—spend their days, and the movement’s emphasis on “elite forms of advocacy, like litigation and high-level lobbying” rather than on “popular engagement.” Purdy, *supra* note 15. Notably absent from this summary of environmental justice critiques of mainstream environmentalism is any mention of addressing potential conflicts between social justice and environmental concerns.
  28. For example, in 1970, early “eco-justice” advocate Norman Faramelli argued: “Most of the solutions suggested for environmental quality will have, directly or indirectly, adverse effects on the poor and lower income groups.” Peter Wenz, *Does Environmentalism Promote Injustice for the Poor?*, in ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM, *supra* note 18, at 57, 59 (quoting Norman Faramelli). By way of explication, Faramelli noted that “[i]f the cost of pollution control is passed directly on to the consumer on all items, low income families will be affected disproportionately” and “[i]f new technologies cannot solve the environmental crisis and a slowdown in material production is demanded, the low income families will again bear the brunt of it, as more and more of them will join the ranks of the unemployed.” *Id.*
  29. See, e.g., Tsosie, *Environmental Justice*, *supra* note 12, at 1628-30 (tracing the history of the environmental justice movement’s relationship to tribes and arguing for a more comprehensive conception of environmental justice that values tribal self-determination to enable tribal autonomy and governance over economic and environmental choices); see also Sarah Krakoff, *Tribal Sovereignty and Environmental Justice*, in JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS 161, 163 (Kathryn M. Mutz et al. eds., 2002).
  30. See sources cited *supra* note 12. In particular, Professor Tsosie argues in *Environmental Justice* that environmental justice has taken a profoundly insufficient view of what justice means in the context of indigenous peoples

discussed more fully in Subsection II.B.1.b. These efforts, however, have typically been limited to specific contexts and have not tried to generalize their observations or conceptualize more broadly what justice—or environmental justice—means when social justice and environmentalism conflict.

Even Purdy's recent thoughtful and impassioned plea for mainstream environmentalism to go the distance in embracing environmental justice focuses on areas of potential agreement and synergy between protecting the environment and furthering social justice—on expanding environmental advocacy to include, once again, the built environment and workplace toxic exposure and on promoting “[a]ggressive enforcement of anti-pollution law against facilities” that “expose[] people living nearby to a bunch of hazardous pollutants.”<sup>32</sup> The conspicuous lack of discussion of any potential conflict suggests that both environmental justice and mainstream environmentalism continue to overlook those situations in which social justice and environmentalism go head-to-head instead of hand-in-hand.<sup>33</sup>

One thing is clear: to fully embrace Purdy's call to treat “[e]conomic power, racial inequality, and the struggles of indigenous peoples” as the

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and the catastrophic consequences of climate change. Tsosie, *Environmental Justice*, *supra* note 12, at 1675-77.

31. See, e.g., Burkett, *supra* note 12; Tsosie, *Environmental Justice*, *supra* note 12.

32. Purdy, *supra* note 15.

33. Those who view traditional environmental justice as focused on both the harms of environmental degradation *and* the harms of environmental protection could conceive of our project as an exploration of how the larger, mainstream environmental movement might integrate this more expansive notion of environmental justice, rather than mainstreaming only those environmental justice concerns in which social justice and environmental protection are not in tension. (Certainly, mainstream environmentalism—including most advocacy groups, scholars, and the EPA—view environmental justice as focused only on harms caused by environmental degradation.) Reframing our arguments in this way would change little in our analysis. Nevertheless, it is important to note that for concision and consistency, throughout this Article, we use the shorthand “traditional environmental justice” to refer to environmental justice claims that arise only out of the harms of environmental degradation and use “just environmentalism” to refer to the expansion of these justice concerns to the harms caused by environmental protection.



“heart” of the environment movement will require us to grapple more fully with those situations in which important social justice values and environmental protection and conservation diverge.<sup>34</sup> So even as many of the major questions and themes of the environmental justice literature resonate with the challenges we examine in this Article, the literature on environmental justice—as rich as it is—requires extension, adjustments, and perhaps some reimagining to account for situations in which environmental protection and justice stand, if not in opposition, at least in tension.

### *B. Relevant Thematic Insights from Allied Literatures*

Of course, it is no surprise that there are many instances in which environmental protection and social justice do not necessarily go hand-in-hand. Many literatures allied with the environmental justice literature have identified the possibility of conflict between protecting the environment and protecting society’s most vulnerable. While these literatures often stop short of fully counting and grappling with the potential costs of environmental protection for the lives and livelihoods of the vulnerable, they nonetheless suggest some important insights—including potential pitfalls and stumbling blocks—for conceptualizing a more just environmentalism.

#### 1. Sustainable Development, Climate Change Justice, and Other Emerging International Law Norms

##### a. Sustainable Development

Sustainable development focuses on three basic policy realms—“economy, environment, and equity”—and “projects them over the present and future time scales.”<sup>35</sup> In particular, sustainable development seeks to find a balance between environmental protection, on the one hand, and economic development, on the other. It recognizes both the importance of economic growth, particularly for those in developing countries, and the importance of managing that growth to reduce harm to, if not enhance, the natural environment. Moreover, it proceeds on the assumption that

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34. Purdy, *supra* note 15.

35. J.B. Ruhl, *Sustainable Development: A Five-Dimensional Algorithm for Environmental Law*, 18 STAN. ENVTL. L.J. 31, 39 (1999).

countries unable to develop in the age of relatively unchecked pollution should not be held back in the age of environmental protection and that poverty itself is prone to ravage the environment.

Despite this nod to equity across countries, equity in the sustainable development context is understood primarily in intergenerational terms: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>36</sup> Importantly for our purposes, the sustainable development movement asks us to stay our hand and temper short-term gains, but it does not provide much guidance about who should bear the short-term losses that balancing development with environmental protection will almost certainly entail.<sup>37</sup>

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36. *Report of the World Commission on Environment and Development: Our Common Future*, WORLD COMM'N ON ENV'T & DEV. 43, <http://www.un-documents.net/our-common-future.pdf> [<http://perma.cc/K6P4-CXC4>]; see also *id.* at 46 (describing "a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations"); U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Princ. 3 (Aug. 12, 1992), <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> [<http://perma.cc/JUD2-NUFS>] ("The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."). Sustainable development takes a long-term view that recognizes that preserving the natural environment is not only critical for quality of life, both now and into the future, but also that the resources we preserve may play a critical role in future economic development. Accordingly, sustainable development is interested not only in finding a balance between current development and protection of the environment but also between the current generation and those generations yet to come.

37. Indeed, one of the most common critiques of sustainable development is that it lacks well-defined, concrete content and thus is susceptible to multiple, conflicting interpretations by different interest groups. See, e.g., M. Nils Peterson et al., *Moving Toward Sustainability: Integrating Social Practice and Material Process*, in ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM, *supra* note 18, at 189, 192. In some contexts, agreement on sustainable development masks deep divides about both appropriate policies and the values that inform those policies. See *id.* at 192 ("Multiple meanings evolved as sustainability advocates rooted the concept in their personal moral sentiments without making the values and politics associated with those sentiments explicit.").

While the general outlook of sustainable development might give us a place to start the conversation, it does not provide us a very clear sense about where the conversation will take us.

b. International Environmental Justice and Climate Change Justice

The developing international norms of climate change justice are some of the first to recognize the injustice of climate change measures—whether adaptation or mitigation—that exacerbate the plight of the poor and otherwise vulnerable.<sup>38</sup>

More generally, environmental justice at the international scale seems to pay more attention to the disproportionate burdens of environmental protection imposed on the poor than domestic environmental justice. Perhaps this is because, in many respects, international environmental justice emerged “as the developing world’s answer to the industrialized world’s growing concern to preserve environmental goods such as species and ecosystems, many of which exist primarily in developing countries.”<sup>39</sup> Thus, international environmental justice was rooted largely in the burdens that the Global North’s appetite for environmental protection imposed on the poor in the Global South. It resonated with the critiques of “eco-imperialism” or “environmental-imperialism,” which asserted that the “wealthy, developed countries of the North,” having despoiled and

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38. See, e.g., W. Neil Adger et al., *Toward Justice in Adaptation to Climate Change*, in FAIRNESS IN ADAPTATION TO CLIMATE CHANGE 1, 4 (W. Neil Adger et al. eds., 2006) (arguing that “actions taken to adapt to climate change can themselves have important justice implications because their benefits and costs are frequently distributed in ways that consolidate or exacerbate current vulnerabilities rather than reduce them” and proposing different principles of justice that might suggest how burdens should be distributed); Stephen H. Schneider & Janica Lane, *Dangers and Thresholds in Climate Change and the Implications for Justice*, in FAIRNESS IN ADAPTATION TO CLIMATE CHANGE, *supra*, 23, 42-43 (noting that while “participation by the developing world in [green-house gas emission] mitigation is essential,” the “common, but differentiated responsibilities” for mitigation costs adopted by international climate agreements reflects the view that developing countries should bear less mitigation costs than the developed countries who have contributed most to climate change).

39. Dale Jamieson, *Justice: The Heart of Environmentalism*, in ENVIRONMENTAL JUSTICE & ENVIRONMENTALISM, *supra* note 18, at 85, 90.

exploited their own resources to build a foundation of wealth, were using tools like trade policy to “impose their environmental preferences and priorities on the poor, developing countries of the South.”<sup>40</sup> And, while international environmental justice has been invoked in a wide range of issues, perhaps its most visible application today is in “climate change” justice,<sup>41</sup> which from its inception has been concerned not only with the disproportionate harms that climate change will inflict on the poor but also with the disproportionate economic harms that less developed countries may suffer if climate change mitigation regimes require them to restrict their use of fossil fuels.<sup>42</sup>

In contrast, domestic environmental justice grew out of the siting of polluting factories and waste disposal facilities—environmental hazards—in poor and minority neighborhoods and thus was focused primarily on the unjust distribution of the harms of environmental degradation. Concerns for environmental protection’s potential harm to economic interests might also have a stronger voice in the international context because those concerns were voiced by countries with a seat at the negotiating table, even if poorer countries’ views were sometimes less influential.<sup>43</sup> Domestically, vulnerable communities have been excluded

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40. Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 DENV. U. L. REV. 979, 980 (2001) (proposing that “environmental imperialism” be reconceptualized as “the North’s systematic and ongoing appropriation of the South’s ecological resources”).

41. Some scholars, including Maxine Burkett, have argued for the application of climate justice principles domestically, as well. See Burkett, *supra* note 12.

42. The relationship between climate justice and environmental justice can be conceptualized in a number of ways. For some, climate justice is simply “environmental justice on the issue of climate change,” J. Timmons Roberts, *Globalizing Environmental Justice*, in ENVIRONMENTAL JUSTICE & ENVIRONMENTALISM, *supra* note 18, at 285, 294, or a “sub-discipline of environmental justice,” Burkett, *supra* note 12, at 192, while for others climate justice arguably represents something more transformative: the “next generation of environmental justice theory and action,” see *id.* (quoting Pellow & Brulle, *supra* note 23).

43. Potential explanations for why just environmentalism has gotten more attention in the international context are explored more fully in Section V.D, *infra*. The international community has likewise led on the rights of indigenous peoples in a way that has outpaced domestic vindication of those rights. When the UN Declaration on the Rights of Indigenous Peoples was adopted in 2007, it was overwhelmingly approved by 144 states of the

from the negotiating tables where the distribution of protections as well as the allocation of harms have been decided. Consequently, domestic just environmentalism potentially has much to learn from international environmental norms both about recognizing the unfair distribution of the costs of environmental protection and about the importance of voice and participation in developing just environmental policy.

### c. Other Emerging International Law Norms

Another important and relevant principle of international environmental law is the concept of “common but differentiated responsibilities” (CBDR). This principle was first formally recognized in the Rio Declaration on Environment and Development generated at the 1992 United Nations Conference on Environment and Development. The basic idea of CBDR is that all countries should protect the global environment—“the common heritage of mankind”—but that richer countries that have inflicted more harm on the global ecosystem and have more resources have a greater obligation to pay for preventive and remedial action.

CBDR was explicitly adopted as Principle 7 of the Rio Declaration<sup>44</sup> and has since exerted a strong influence on the direction of international environmental law. More specifically, CBDR has become an important part of international climate change agreements, including the United Nations Framework Convention on Climate Change and the Kyoto Protocol. The principle has been a point of contention, particularly for the United States,

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United Nations, with only four votes against, those coming from the United States, Canada, Australia, and New Zealand. *See* UN HUMAN RIGHTS OFFICE OF HIGH COMM’R, THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A MANUAL FOR NATIONAL HUMAN RIGHTS INSTITUTIONS, at vi n.5 (2013), <http://www.ohchr.org/Documents/Issues/IPeoples/UNDRIPManualForNHRI.pdf>, [<http://perma.cc/56V6-E6PS>].

44. Rio Declaration on Environment and Development, *supra* note 36 (“States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”).

and in the 2015 Paris Agreement it was amended to “common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”<sup>45</sup> Nonetheless, CBDR suggests that justice requires attention to responsibility and resources: both responsibility for harm and the distribution of available resources for mitigating and responding to that harm matter.

Other international norms also address potential conflicts between economic interests and the environment. Intergenerational equity might be viewed as a weak norm, but a strong argument in favor of sustainable economic development and natural resource use.<sup>46</sup> Some other international norms focus more explicitly on the costs environmental protection may impose on the poor. For example, many international treaties and organizations require protections for the poor when addressing natural resource protection.<sup>47</sup> In addition, particular substantive and procedural norms with regard to the rights of indigenous peoples are enshrined in the United Nations Declaration on the Rights of Indigenous Peoples adopted in 2007, including a right to meaningful consultation with governments before adoption of measures that may affect them.<sup>48</sup>

## 2. Just Transition

To date, “just transition” is more of an advocacy position informed by environmental justice and climate change justice than a separate, well-developed scholarly concept.<sup>49</sup> Nonetheless, its consideration here is

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45. U.N. Conference of the Parties, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/10/Add.1, art. 4.3 (Dec. 12, 2015), <http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf> [<http://perma.cc/39H6-Z9VP>].

46. See, e.g., WALTER F. BABER & ROBERT V. BARTLETT, CONSENSUS AND GLOBAL ENVIRONMENTAL GOVERNANCE 44 (2015).

47. See, e.g., Dinah Shelton, *Resolving Conflicts Between Human Rights and Environmental Protection*, in HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS 206, 209 (Erika De Wet & Jure Vidmar eds., 2012) (describing International Whaling Convention exception for subsistence hunting).

48. See G.A. Res. 61/295, Declaration on the Rights of Indigenous People, at Art. 19 (Sept. 13, 2007).

49. The law review literature on just transition, for example, is relatively sparse, although there are a few articles that consider it. See, e.g., J. Mihn Cha, *Labor Leading on Climate: A Policy Platform to Address Rising Inequality and*

important because it is one of the relatively rare principles that focuses explicitly and exclusively on a fair distribution of the burdens of environmental protection—in particular, the burdens of transitioning away from a fossil fuel energy economy to mitigate greenhouse gas emissions.

Some twenty years ago, a coalition of U.S. environmental and climate justice groups—the Environmental Justice and Climate Change Initiative—set forth “10 Principles for Just Climate Change Policies in the U.S.”<sup>50</sup> The Initiative’s third principle focuses on “ensur[ing] just transition for workers and communities.”<sup>51</sup> In particular, it argues that “[n]o group should have to shoulder alone the burdens caused by the transition from a fossil fuel-based economy to a renewable energy-based economy.”<sup>52</sup> Accordingly, “a just transition would create opportunities for displaced workers and communities to participate in the new economic order through compensation for job loss, loss of tax base, and other negative effects.”<sup>53</sup> Subsequently, a wide variety of climate change justice groups have endorsed and advocated for a just transition,<sup>54</sup> and just transition is also mentioned in the preamble of the historic Paris climate agreement negotiated in December 2015.<sup>55</sup> Just transition has likewise been an important component of labor union advocacy.

A more fully theorized and fleshed-out version of “just transition” might ultimately be an important building block (or subset) of just

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*Rising Sea Levels in New York State*, 34 PACE ENVTL. L. REV. 423, 445 (2017); Alan Ramo & Deborah Behles, *Transitioning a Community Away from Fossil-Fuel Generation to a Green Economy: An Approach Using State Utility Commission Authority*, 15 MINN. J.L. SCI. & TECH. 505 (2014).

50. See Roberts, *supra* note 42, at 295.

51. *10 Principles for Just Climate Change Policies in the U.S.*, EJNET, <http://www.ejnet.org/ej/climatejustice.pdf> [<http://perma.cc/GUE6-BCCA>].

52. *Id.*

53. *Id.*

54. See TRACEY SKILLINGTON, CLIMATE JUSTICE AND HUMAN RIGHTS 75 (2016).

55. See U.N. Conference of the Parties, *Adoption of the Paris Agreement, Proposal of the President* at 21, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015), <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>, [<http://perma.cc/3QAF-V6SL>] (“The Parties to this Agreement... Taking into account the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities....”)

environmentalism. Just transition does not, however, speak to the full range of issues that just environmentalism implicates as not every issue can be framed as a transition to some agreed upon “better world” that imposes essentially “temporary” dislocation costs on certain groups. At the very least, just environmentalism requires us to think more carefully about what we are transitioning to—for example, whether a transition to national parks purged of indigenous cultures and peoples can ever be truly just.

### 3. The Commons

The literature on the commons focuses primarily on the classic commons problem—the tragedy of the commons, in which open-access resources are overused as self-interest pushes toward use even as a diffuse collective interest pushes toward conservation.<sup>56</sup> Much commons scholarship builds on Nobel Prize winner Elinor Ostrom’s principles of long enduring institutions, which try to derive general observations from case studies about why some communities succeed in avoiding the tragedy of the commons while others succumb.<sup>57</sup>

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56. Garrett Hardin, *The Tragedy of the Commons*, 162 Sci. 1243 (1968). Though not as relevant to this Article, we note that another branch of the commons literature looks at the benefits created by using the commons. Carol Rose’s seminal article, *The Comedy of the Commons*, 53 U. CHI. L. REV. 711 (1986), in many ways sits at the heart of this branch. Other kinds of commons problems relate to how to inspire collective action, how to thwart free riding, and how multiple uses of resources often conflict with each other.

57. See ELINOR OSTROM, GOVERNING THE COMMONS 88-102 (1990). Ostrom’s principles have been developed and refined by a number of other important works. See, e.g., JEAN-MARIE BALAND & JEAN-PHILIPPE PLATEAU, HALTING DEGRADATION OF NATURAL RESOURCES: IS THERE A ROLE FOR RURAL COMMUNITIES? 243-45 (1996); ROBERT WADE, VILLAGE REPUBLICS: THE ECONOMIC CONDITIONS OF COLLECTIVE ACTION IN INDIA 215-16 (1988); Arun Agrawal, *Common Property Institutions and Sustainable Governance of Resources*, 29 WORLD DEV. 1649, 1654 (2001); Michael Cox et al., *A Review of Design Principles for Community-Based Natural Resource Management*, 15 ECOLOGY & SOC’Y 38 (2010); Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. 247 (1992).



This literature often focuses on poor communities, demonstrating how the commons often serve as a refuge for the poor<sup>58</sup> and exploring the ingenuity of the ordinary, often-poor people who find ways to cooperate and make life on the commons work.

Nonetheless, while the commons literature at least implicitly calls for a balanced approach to resource use, it does not provide much insight into how to approach those situations in which we have to choose between environmental protection and the livelihoods of resource users. Indeed, while the literature has done a great deal in helping make headway in identifying, diagnosing, and even solving commons resource problems, the same literature has been criticized (even by scholars working on it) for paying too little attention to socio-economic impacts of commons management.<sup>59</sup> This seems to be a fair criticism: beyond the insights of resource management, which often helps the poor and does so by design, the literature does not have a tradition of focusing on social equity.

Despite having contributed to the long-term management of resources on which the poor are often reliant, other than expressing a desire for balance, this literature does not tell us how—when tradeoffs need to be made—to weigh environmental protection on the one hand against the livelihoods of resource users on the other.

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58. See Kanchan Chopra & Purnamita Dasgupta, *Common Pool Resources and the Development Process: Evidence from India*, UK DEP'T FOR INT'L DEVELOPMENT (2002), [http://assets.publishing.service.gov.uk/media/57a08d2940f0b652dd0017c6/R7973\\_F2INDIA.PDF](http://assets.publishing.service.gov.uk/media/57a08d2940f0b652dd0017c6/R7973_F2INDIA.PDF) [<http://perma.cc/3E96-KXS2>].

59. See, e.g., Arun Agrawal, *Studying the Commons, Governing Common-Pool Resource Outcomes*, 36 ENVTL. SCI. & POL'Y 86, 89 (2013) ("If it is necessary to distinguish between the many different outcomes of the governance of common-pool resource systems—among them, livelihoods benefits from the resource, equity in the distribution of benefits, diversity of biological systems, and long-term sustainability of the resource system—and that these outcomes may not be tightly correlated, then the task facing scholars of commons is only starting."); Arun Agrawal & Catherine Shannon Benson, *Common Property Theory and Resource Governance Institutions: Strengthening Explanations of Multiple Outcomes*, 38 ENVTL. CONSERVATION 199 (2011).

### III. JUST ENVIRONMENTAL CASE STUDIES

Situations in which environmental protection imposes disproportionate costs on the poor and vulnerable are both very common and very diverse. This Part provides a representative sampling of the kinds of conflicts that can arise, including cases more commonly associated with natural resource conservation and others more commonly associated with pollution mitigation and abatement. We provide these examples both to illustrate the breadth of topics where we might find environmental protection and social justice in tension and also to sketch out categories of these sorts of problems. Our examples sort into three broad categories: harms related to environmental conservation; job losses related to pollution-control regulation; and regressive environmental taxes, subsidies, and mandates that burden the poor. In subsequent Parts, we provide an argument about why we ought to care about the sorts of problems we identify here and what might be done about them.

#### A. *Environmental Conservation: Protected Areas and Habitat*

To the extent that people are dependent on land, it is not just the destruction of it that deprives people—so might the protection of it when protection means less use of it.<sup>60</sup>

##### 1. Protected Areas

Many of the beginning chapters of national park management in the United States revolve around setting up park concessions and evicting Native Americans who had used and managed the lands for millennia. Professor Sarah Krakoff has recently identified this “divest[ing] of [Tribal] lands and cultural heritage in the name of preserving these resources for others” as “the dark side of conservation history.”<sup>61</sup> The idea propagated

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60. As Professor Rebecca Tsosie argues, this principle may apply with particular force where the ties to land encompass tradition, culture, spirituality, and identity, as it does for many indigenous peoples. She argues that an adaptation strategy in response to climate change that includes removal of indigenous groups may prove “genocidal” for such indigenous groups. Tsosie, *Environmental Justice*, *supra* note 12, at 1625.

61. Krakoff, *supra* note 12, at 1.

by John Muir of park resources being unspoiled wilderness required elimination of human presence to create an illusion of the pristine.<sup>62</sup>

For example, in the 1870s, in events foreshadowing the formation of other national parks, the United States Government forcibly evicted Native Americans from Yellowstone National Park in the name of environmental conservation. Despite thousands of years of Native Peoples in the area utilizing, managing, and sharing the region's resources, the legal protections of a park designation were deemed preferable and the presence of native inhabitants was deemed an incompatible use. Many of the tribes from the region traditionally used the area for purposes ranging from ceremonial to sustainable resource extraction such as gathering foodstuffs, medicinal plants, and materials essential for tools.<sup>63</sup> The federal government cut off access to these vital resources when it removed the park's traditional native occupants and imposed a restrictive scheme on the use of the land, all without consultation or consideration of the costs for the indigenous peoples of the region. In an ironic twist, visitors to Yellowstone National Park can still see today the park offices and housing in Mammoth Hot Springs that once were military barracks built to promote and protect that illusion of unspoiled wilderness.<sup>64</sup> The soldiers housed in those barracks were charged with keeping native peoples out of Yellowstone,<sup>65</sup> and they frequently removed members of the twenty-six tribes with a presence in the area, including Shoshone, Sheep Eater, Crow, and Bannock peoples, from the park.<sup>66</sup>

Similarly, while members of the Blackfoot tribe were originally allowed to remain in Glacier National Park, in 1912, members of the Tribe were arrested for exercising their treaty rights to hunt and fish in the area, and the Park Service ultimately determined it would eject the members of the Tribe.<sup>67</sup> Similar stories stain the founding of many U.S. national parks, including the Grand Canyon, Yosemite, and Zion.

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62. See, e.g., *id.* at 21.

63. See MARK DAVID SPENCE, *DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS* 56-59 (1999); see generally Krakoff, *supra* note 12, at 21-22.

64. See SPENCE, *supra* note 63, at 56-59.

65. See *id.*; see also Krakoff, *supra* note 12, at 22-23.

66. *Id.*

67. See ROBERT H. KELLER & MICHAEL F. TUREK, *AMERICAN INDIANS AND NATIONAL PARKS* 52 (1998); Isaac Kantor, *Ethnic Cleansing and America's Creation of National Parks*, 28 PUB. LAND & RESOURCES L. REV. 41, 52 (2007).

Moreover, this restriction of tribal treaty rights in the name of conservation is hardly a relic of a benighted past. In April 2016, a member of the Crow Tribe of Montana was convicted of poaching an elk within the boundaries of the Bighorn National Forest.<sup>68</sup> He asserts that he was within the Crow Reservation boundary in Montana, which abuts the Montana/Wyoming state line. Wyoming game wardens asserted that he had wandered across the state line where he took an elk.<sup>69</sup> He is currently seeking review of his conviction from the Supreme Court, arguing that the 1868 Treaty of Fort Laramie protects the right of Crow tribal members to hunt in the area, even on the Wyoming side of the line.<sup>70</sup>

Even though the United Nations Declaration on the Rights of Indigenous Peoples articulates a right to “the free, prior and informed consent” of indigenous peoples before removal, with compensation and an option to return,<sup>71</sup> we also find other recent stories from across the globe. Tanzania has evicted the Maasai out of Ngorongoro National Park (outside of Serengeti).<sup>72</sup> Uganda has removed the Batwa from Bwindi and Mgahinga National Parks to protect mountain gorillas.<sup>73</sup> Sri Lanka has removed indigenous peoples to protect Maduru Oya National Park.<sup>74</sup> In the name of

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68. See Petition for Writ of Certiorari at \*2-3, *Herrera v. Wyoming*, 138 S. Ct. 2707 (2018) (No. 17-532).

69. *Id.*

70. *Id.*

71. See G.A. Res. 61/295, Declaration on the Rights of Indigenous People, at Art. 19 (Sept. 13, 2007).

72. See Chris Lang, “Forced Evictions of Maasai People in Loliondo, Tanzania”: Urgent Alert from the International Work Group for Indigenous Affairs, CONSERVATION-WATCH (Aug. 30, 2017), <http://www.conservation-watch.org/2017/08/30/forced-evictions-of-maasai-people-in-loliondo-tanzania-urgent-alert-from-the-international-work-group-for-indigenous-affairs> [<http://perma.cc/388F-6UYT>]; Karen McVeigh, “Land Means Life”: Tanzania’s Maasai Fear Their Existence is Under Threat, GUARDIAN (Oct. 16, 2017), <http://www.theguardian.com/global-development/2017/oct/16/land-means-life-tanzania-maasai-fear-existence-under-threat> [<http://perma.cc/4UU9-XQ9N>].

73. See Thomas Fessy, *Batwa Face Uncertain Future*, BBC NEWS (May 9, 2008), <http://news.bbc.co.uk/2/hi/science/nature/7390917.stm> [<http://perma.cc/DH34-3U2B>].

74. See John Vidal, *The Tribes Paying the Brutal Price of Conservation*, GUARDIAN (Aug. 28, 2016), <http://www.theguardian.com/global-development/2016/>

conservation, Mongolia has banned the Dukha from hunting in protected areas within their traditional lands.<sup>75</sup> Thailand has removed ethnic Hmong and the Karen from forests designated as wildlife sanctuaries.<sup>76</sup> The list goes on.

While eviction from lands and deprivation of traditional livelihoods amount to profound harms, they are by no means the only harms associated with conservation efforts. Much of the discontent surrounding some of the national monuments in the U.S. comes down to the monuments locking in conservation at the expense of economic opportunities for people who live in proximity to the monuments. For example, as environmentalists praised President Clinton for setting aside the Grand Staircase-Escalante National Monument in southern Utah, surrounding communities felt the Monument would deprive them of much needed jobs and economic development.<sup>77</sup> The harms alleged often were couched in terms of the Monument depriving an economically depressed area of much needed economic growth and well-paying jobs.<sup>78</sup> Much of the rationale for President Trump's drastic reduction of this monument and

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aug/28/exiles-human-cost-of-conservation-indigenous-peoples-eco-tourism [http://perma.cc/2UY3-52UN].

75. See Dene-Hern Chen, *Mongolia's Reindeer Herders Defend Their Way of Life*, AL JAZEERA (Mar. 18, 2017), <http://www.aljazeera.com/indepth/features/2017/03/mongolia-reindeer-herders-defend-life-170315082203586.html> [http://perma.cc/75ZX-WWBY]; Selcen Kucukestel, *Mongolian Reindeer Herders Banned from Hunting in the Name of "Conservation"*, SURVIVAL (Dec. 22, 2015), <http://www.survivalinternational.org/news/11072> [http://perma.cc/F8DD-KBEA].
76. See Eudey Ardith, *Hmong Relocated in Northern Thailand*, CULTURAL SURVIVAL (Mar. 1988), <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/hmong-relocated-northern-thailand> [http://perma.cc/89DB-PF TV].
77. See, e.g., Phil Taylor, *Grand Staircase-Escalante Winners and Losers*, E&E NEWS (July 14, 2016), <http://www.eenews.net/stories/1060040270> [http://perma.cc/2M7-2T9D].
78. See *id.* ("President Clinton designated the monument in 1996 in large part to block a planned coal mine that had promised several hundred local jobs and millions of dollars in royalty payments."); see also *id.* (quoting Utah Rep. Chris Stewart claiming that the monument has "decimated the local economies" and noting that while tourism jobs have increased, many of those service-sector jobs are low-wage and seasonal, forcing workers to hold down multiple jobs to scrape by).

the Bears Ears National Monument in recent months centered on the desire to open up resource extraction to local communities again.<sup>79</sup>

We see similar threads in the efforts to protect super greenhouse gas sinks, like preserving the tropical rainforests in Africa and South America (particularly the Amazon), as a strategy to mitigate climate change. Within international law, this strategy is referred to as reducing emissions from deforestation and forest degradation (frequently referred to by its quasi-acronym REDD+). While this originally began solely as an attempt to reduce deforestation, it did not take long for it to become apparent that attempts to preserve the forest sometimes worked against the livelihoods of many of the local people in and around the forest. As a result, alongside efforts to reduce deforestation and degradation, we see efforts to provide a buffer for the local people most affected by conservation measures. Specific strategies have included payments for environmental services, formal legal recognition of local rights, and expanding livelihood options and alternative sources of forest products. Important work by Professor William Boyd has both documented and, in some instances, facilitated efforts to work closely with local peoples to voice and understand their interests.<sup>80</sup>

## 2. Species Protection

Another area in which social justice issues complicate environmental protection is the pursuit of the protection of animals and, to a lesser extent, plants. The fact that protecting species has consequences for human lives and the economy should come as no surprise. Critics of laws designed to protect species are quick to point out how these laws collide with human interests. For example, Judge Smith of the Ninth Circuit has argued that the externalities of the Endangered Species Act are so great that it is unthinkable that Congress meant to unleash the tumult caused by the enactment. As a preface to a dissenting opinion, he noted that his "intent is solely to illuminate the downside of our actions in such

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79. See Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), <http://www.nytimes.com/2017/12/04/us/trump-bears-ears.html> [<http://perma.cc/B7BD-9QUJ>].

80. See William Boyd, *Deforestation and Emerging Greenhouse Gas Compliance Regimes: Toward a Global Environmental Law of Forests, Carbon, and Climate Governance*, in *DEFORESTATION AND CLIMATE CHANGE 1* (Valentina Bosetti & Ruben Lubowski, eds. 2010).

environmental cases.”<sup>81</sup> After providing examples of how the Endangered Species Act hurt miners in the case before the court and loggers and farmers in other cases, he summarized by saying, “No legislature or regulatory agency would enact sweeping rules that create such economic chaos, shutter entire industries, and cause thousands of people to lose their jobs.”<sup>82</sup> In a case brought by small-scale farmers and loggers, Justice Scalia also emphasized that the impacts often fell on the less well-off when he lamented that the Endangered Species Act restrictions “impose unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.”<sup>83</sup>

Not surprisingly, the bigger and more dangerous the animal, the more frustrated those who live near such animals are when told not to interfere with them. Big predators pose particularly acute problems. Whether it be wolves in Wyoming, lions in Tanzania, or tigers in India, we find countless conflicts between humans and predators.<sup>84</sup> Often these conflicts stem from problems associated with livestock becoming prey. In trying to protect these predators, different policy solutions have been found with their associated just environmentalism wrinkles. These range from providing some form of compensation for lost livestock to pushing people out of areas where the predators are found.<sup>85</sup> Similar issues arise when laws protect animals that might not be that dangerous but that are large and capable of inflicting substantial collateral damage on people’s lands and livelihoods. For example, outside of the rainforests of Uganda, conflicts can

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81. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1039 (9th Cir. 2011) (Smith, J., dissenting).

82. *Id.* Professor Barton Thompson has made similar arguments: “It is unlikely that Congress could or would have passed the Endangered Species Act or the Clean Water Act had it been aware that the laws would require significant reductions in existing water diversions.” Barton H. Thompson, Jr., *Water Law as a Pragmatic Exercise: Professor Joseph Sax’s Water Scholarship*, 25 *ECOLOGY L.Q.* 363, 373-74 (1998).

83. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting).

84. See Dale D. Goble, *Of Wolves and Welfare Ranching*, 16 *HARV. ENVTL. L. REV.* 101 (1992); Holly Doremus, *Restoring Endangered Species: The Importance of Being Wild*, 23 *HARV. ENVTL. L. REV.* 1, 35-36 (1999).

85. See Goble, *supra* note 84; Abishek Hariharab et. al, *Human Resettlement and Tiger Conservation*, 169 *BIOLOGICAL CONSERVATION* 167 (2014).

arise when jungle elephants or gorillas raid the gardens of those living outside of the forest.<sup>86</sup>

Another opportunity for such conflict arises when hunting and fishing are banned or restricted. Particularly where this is not just a restriction of highly valued animals in the market (e.g., poaching trophy game), such restrictions might push some vulnerable people into an even more desperate situation. While such restrictions certainly affect many different populations, indigenous people are particularly vulnerable to such harm. Thus, for example, the San of the Kalahari Desert have been banned from hunting large game in Botswana to accommodate safari tourism and the sale of government hunting licenses marketed to tourists.<sup>87</sup> We can find similar stories about restrictions on salmon fishing or whale harvesting among first nations in the United States.<sup>88</sup>

### B. Pollution Control

When it comes to pollution control, a very common criticism in political discourse is that reducing pollution comes at the cost of jobs. As we discussed earlier in the context of environmental conservation of wilderness, forests, and species, the trade-off between jobs and environment is one of the most direct and commonly observed conflicts between the needs of the poor and the goals of environmental protection. The examples in this Section are, in many respects, the pollution control analogs to the preservation examples in the previous Section. In some instances, a lower-income community will prefer the promise of jobs, economic growth, and an increased tax base to protection from pollution

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86. See Francine Madden, *Gorillas in the Garden—Human-Wildlife Conflict at Bwindi Impenetrable National Park*, 14 POL’Y MATTERS 180, 185-189 (2006).

87. See Sello Motseta, *Outcry Over Ban on Hunting in Botswana’s Parks*, BUSINESS DAY (Aug. 27, 2013, 9:45 AM), <http://www.businesslive.co.za/bd/world/africa/2013-08-27-outcry-over-ban-on-hunting-in-botswanas-parks> [<http://perma.cc/TVY2-KR7K>]; John Vidal, *Botswana Bushmen: “If You Deny Us the Right To Hunt, You Are Killing Us,”* GUARDIAN (Apr. 18, 2014, 12:59 AM), <http://www.theguardian.com/environment/2014/apr/18/kalahari-bushman-hunting-ban-prince-charles> [<http://perma.cc/Q2CA-EBYR>].

88. See, e.g., Rachel D’Oro, *Native Hunters Kill Whale That Made Its Way to Alaska River*, U.S. NEWS (Aug. 1, 2017, 8:21 PM), <http://www.usnews.com/news/best-states/alaska/articles/2017-08-01/native-hunters-kill-whale-that-made-its-way-to-alaska-river> [<http://perma.cc/6Z23-V53J>].



harms, particularly when the community has few other development choices.

To highlight the potential costs at stake, we begin with the example of the Skull Valley Band of Goshute Indians, a small tribe whose reservation is located near Tooele, Utah, not far from Salt Lake City. The tribe has few economic development prospects.<sup>89</sup> The Goshute people were traditionally hunter-gatherers who traversed the intermountain west to move with the seasons to utilize the region's resources.<sup>90</sup> Their ability to fish, gather plants, and hunt was circumscribed by their relegation to the desolate area of the Skull Valley. Their reservation is resource-poor. The soil is poor quality, even if there were water available for irrigation or grazing. Moreover, surrounding lands have "been used for chemical and biological weapons development and testing, a nerve gas storage facility, a coal-fired electrical power plant that caused air pollution, a low-level radioactive disposal site, two hazardous waste incinerators, one hazardous waste landfill, and a magnesium plant identified by the Environmental Protection Agency (EPA) as the most polluting plant of its kind in the United States."<sup>91</sup>

Because there were so few other existing prospects for economic development on the Skull Valley Goshute reservation, the tribe, like other tribes during the same era, became interested in the economic opportunities offered by nuclear waste disposal and storage.<sup>92</sup> Indeed, Skull Valley Band of Goshute Chairperson Leon Bear argued that "since the reservation is already both symbolically and literally a wasteland, the Skull Valley Band of Goshute should make money from storing another form of waste—nuclear waste."<sup>93</sup> Since Utah's Tooele County had "designated [surrounding areas] as an industrial waste zone," the tribe was simply opting for an economic development opportunity "that fits in with that designation."<sup>94</sup>

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89. See James B. Martin-Schramm, *Skull Valley: Nuclear Waste, Tribal Sovereignty, and Environmental Racism*, in CHRISTIAN ENVIRONMENTAL ETHICS: A CASE METHOD APPROACH, 218, 242 (Jim Martin-Schramm & Robert L. Stivers eds., 2003).

90. See Carling I. Malouf, *The Gosiute Indians*, in THE SHOSHONE INDIANS 25, 52-59 (David Agee Horr ed., 1974).

91. Danielle Endres, *From Wasteland to Waste Site: The Role of Discourse in Nuclear Power's Environmental Injustices*, 14 LOCAL ENV'T 917, 928 (2009).

92. See *id.*

93. *Id.*

94. *Id.*

In 2005 and 2006, Utah lawmakers moved to thwart the Tribe's proposal. The opposition to the proposal to store nuclear waste made strange bedfellows of conservative Republican politicians and wilderness advocates. Traditionally opposed to federal land use protections, which they typically viewed as intrusions on state sovereignty, conservative Utah officials joined forces with environmental groups to create the Cedar Mountain Wilderness Area. The coalition of conservatives and environmentalists successfully petitioned for the wilderness designation of lands surrounding the Tribe's reservation and thereby blocked the Skull Valley Goshute's efforts. The wilderness designation precluded the building of the railroad lines that would have been necessary to transport the nuclear waste to the reservation.<sup>95</sup> Once the Skull Valley Goshute's plans were thwarted, neither Utah lawmakers nor the environmental groups that had helped block the development appeared to be much concerned with the ongoing economic distress on the reservation or the ability of the Tribe to make meaningful decisions about its future.

Numerous other examples of these kinds of conflicts can be identified. For example, as discussed in the Introduction, after the BP Oil Spill, the Obama administration imposed a moratorium on drilling in the Gulf. That moratorium, designed to prevent further damage to the already critically endangered Gulf environment,<sup>96</sup> nonetheless imposed serious economic costs on working-class citizens whose jobs depend on the oil and gas

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95. See Associated Press, *Nuclear Waste? Utah Says Not in Our Wilderness: Lawmakers Get Designation as Way to Stop Proposed Storage Site*, NBC NEWS (Feb. 15, 2006, 01:09 PM), [http://www.nbcnews.com/id/11362386/ns/us\\_news-environment/t/nuclear-waste-utah-says-not-our-wilderness](http://www.nbcnews.com/id/11362386/ns/us_news-environment/t/nuclear-waste-utah-says-not-our-wilderness) [<http://perma.cc/2UWP-M6Y9>] (noting that “[f]or more than two decades, Utah’s congressional delegation rejected wilderness proposals,” “but they united behind the idea of protecting this 55-mile stretch that divides barren Skull Valley and the desolate salt flats that are already home to an array of military and industrial hazards” to “cut[] off the only practical route for rail spur delivering heavy steel casks of spent fuel rods to the Goshute reservation”).

96. The moratorium was also designed to protect worker safety. See, e.g., U.S. DEP’T OF INTERIOR, DECISION MEMORANDUM REGARDING THE SUSPENSION OF CERTAIN OFFSHORE PERMITTING AND DRILLING ACTIVITIES ON THE OUTER CONTINENTAL SHELF (July 12, 2010), <http://www.doi.gov/sites/doi.gov/files/migrated/deepwaterhorizon/upload/Salazar-Bromwich-July-12-Final.pdf> [<http://perma.cc/V2US-XR53>] (noting that the Secretary was acting pursuant to his obligation to ensure that drilling is “conducted in a manner that is safe for workers, coastal communities, and the environment”).

industry.<sup>97</sup> More mundane instances when pollution control measures burden environmental justice communities occur, for example, when state or federal regulatory agencies block or increase the cost of siting of pollution-producing facilities in areas hungry for the jobs and increased tax base that economic development promises. To be clear, this does not mean that vulnerable communities oppose the environmental protections. Many in such communities (even most) might favor the protections, but often there are also others who are conflicted or even opposed to environmental measures for the sake of economic opportunities. We see these costs as coal-fired plants have shuttered in recent years. Even though most of these plants are facing hard times because of increased competition from cheap natural gas and renewables, part of their economic trouble arguably comes from environmental regulation. Opponents of President Obama's Clean Power Plan have cheered Trump's effort to rollback the Plan, calling the environmental regulations "job-killing" and arguing that the regulations "were a wet blanket on the ... economy."<sup>98</sup>

### *C. Regressive Environmental Taxes, Subsidies, and Mandates*

The examples in this Section identify an array of environmental protection measures—particularly taxes and subsidies—that share a common feature: they all make essential (or at least important) goods and services more expensive for the poor. Moreover, because purchase of these goods and services consumes a larger percentage of the budget of the poor than of those who are more affluent, these measures are regressive. Although less common, the disproportionate burden on the poor may also be exacerbated in some of these examples because, even in absolute terms, the poor may incur higher costs than the affluent because, for example,

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97. See Associated Press, *supra* note 4.

98. See Kiah Collier, *Trump Unveils Major Rollback of Obama's Clean Power Plan*, TEX. TRIB. (Aug. 21, 2018), <http://www.texastribune.org/2018/08/21/trump-unveils-major-rollback-obamas-clean-power-plan> [<http://perma.cc/5VVF-34P7>]. Opponents raise this objection even though the Clean Power Plan, if implemented, would promote job growth in different industries, like green energy. The growth of green jobs is, of course, of little comfort to those workers who lose power-plant jobs if they cannot transition to jobs in the emerging green economy. See Sidney A. Shapiro & Robert R.M. Verchick, *Inequality, Green Resilience, and the Green Economy*, 86 UMKC L. REV. 1, 16-17 (2018).

they drive older, less fuel-efficient vehicles or because they live in poorly insulated homes with less energy efficient appliances.

Most of these measures involve pollution control rather than conservation efforts. However, these measures can sometimes be enacted to further conservation goals, such as prohibiting people from hunting or fishing endangered species (even for subsistence purposes) or proscribing agricultural methods (such as slash-and-burn subsistence agriculture) that threaten forests. These kinds of measures, too, can impose a disproportionate burden on the poor who are most likely to be engaged in subsistence agriculture and most dependent on local natural resources for survival.

### 1. Environmental Taxes

Environmental taxes are a frequently employed tool for internalizing the costs of environmental pollution and thus shifting consumption away from products with relatively high environmental costs. One common example of an environmental tax is a gas tax: increasing the gas tax incentivizes drivers to drive less and decreases greenhouse gas emissions. Gas taxes can disproportionately impact the poor, particularly those who depend on cars—often older model cars with low fuel efficiency—to get to work.<sup>99</sup> The degree of regressivity of transportation subsidies and taxes in any given location is likely to depend on the quality of available public transportation and the rates of car ownership among the poor.<sup>100</sup>

Broader energy taxes, such as proposed carbon taxes, are also likely to be regressive—inflicting “a heavier burden on low-income households than on high-income households” because they “affect the cost of heating, electricity and transport,” and lower-income households “spend a larger

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99. Katri Kosonen, *Regressivity of Environmental Taxation: Myth or Reality?*, EUR. COMM’N 7, Taxation Paper No. 32-2012 (2012), [http://ec.europa.eu/taxation\\_customs/sites/taxation/files/docs/body/taxation\\_paper\\_32\\_en.pdf](http://ec.europa.eu/taxation_customs/sites/taxation/files/docs/body/taxation_paper_32_en.pdf) [<http://perma.cc/89EY-U8AH>] (reporting studies in the US and UK that show “that middle-income groups bear a higher burden of gasoline tax in the US than either low- or high-income groups,” but that “if only car-owning households are considered, the impact of fuel taxation would be regressive”).

100. *See id.* at 19 (observing that some countries’ fuel taxes were not regressive, probably because of the “supply of good-quality transport” that “ma[de] a private car more a luxury good, the use of which would increase strongly with income level”).

share of their income” on these necessities.<sup>101</sup> Indeed, the empirical evidence suggests that energy taxes are more likely to be regressive than gasoline taxes.<sup>102</sup> Moreover, social justice concerns are most acute when the tax is on goods (or services) such as energy that are essential—for which at least some level of consumption is necessary and for which adequate substitutes do not exist—that is, when the tax is on goods for which demand is relatively inelastic. There are nonetheless a variety of available mechanisms for reducing an energy tax’s regressivity, including using “tax revenues to finance lump-sum transfers”<sup>103</sup> or creating tax exemptions for low-income households.<sup>104</sup>

## 2. Environmental Subsidies

### a. Net Metering

There are a wide variety of subsidies for environmentally-friendly behavior that can make goods and services—often essential goods and services—more expensive for the poor. In recent years, one of the most visible and contentious of these subsidies is net metering for residential solar energy production. Solar energy produces numerous environmental benefits, including reduced greenhouse gas emissions, by decreasing consumption of fossil fuel. However, one of the most controversial issues surrounding residential generation of solar power has been the price electric utilities pay solar customers for excess power that the customers send back into the electricity grid. Residential solar customers often produce more power than they need during the day but need to draw electricity from the grid at night or during particularly inclement weather. Net metering policies provide credits to solar customers for the excess power they generate during the day and feed into the electricity grid that can be used to offset the power the homes draw from the grid at night or during other periods in which the home’s electricity consumption exceeds its generation.<sup>105</sup>

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101. *Id.* at 1.

102. *See id.* at 7.

103. *Id.* at 18.

104. *See id.* at 16.

105. Troy A. Rule, *Solar Energy, Utilities, and Fairness*, 6 SAN DIEGO J. CLIMATE & ENERGY L. 115, 118 (2015).

Many electric utilities have challenged requirements that they compensate solar customers at the retail (rather than wholesale) rate for the power those customers feed into the grid.<sup>106</sup> The utilities typically contend that solar customers are using and benefitting from the electricity grid without having to pay for that infrastructure or its maintenance, and that credits for solar customers should therefore be reduced to ensure that they pay their fair share for that grid infrastructure.<sup>107</sup> In particular, they argue that poorer customers who cannot afford solar panels are being forced to subsidize richer customers who can.<sup>108</sup>

Some groups representing poor or otherwise vulnerable communities have joined utility companies in their efforts to decrease credits to solar customers. For example, a National Black Caucus of State Legislators white paper explained:

We are concerned about the regressive nature of the cost-shifting that results from the net metering policies used to make DG [distributed generation] appear to be a more attractive financial proposition. The end result is that households not able to afford DG systems are inadvertently left to pay more for the electric grid. These costs will continue to escalate as DG providers continue to market to more affluent households. The last in line will continue to share an increasingly larger financial burden.<sup>109</sup>

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106. *Id.*

107. Hiroko Tabuchi, *Rooftop Solar Dims Under Pressure from Utility Lobbyists*, N.Y. TIMES (July 8, 2017), <http://www.nytimes.com/2017/07/08/climate/rooftop-solar-panels-tax-credits-utility-companies-lobbying.html> [http://perma.cc/DYX3-U44Z] (“Utilities argue that net metering, in place in over 40 states, turns many homeowners into free riders on the grid, giving them an unfair advantage over customers who do not want or cannot afford solar panels.”). Some scholars argue that net metering is not as regressive as it appears because any rate increases are likely to be “modest” and “would barely begin to offset the massive cross-subsidies for which low-income customers already qualify,” in the form of “significant rate discounts” already available to low-income households. Rule, *supra* note 105, at 136-37.

108. See Rule, *supra* note 105, at 136-37.

109. Nat’l Black Caucus of State Legislators Comm. on Energy Transportation & Transp., *The Need To Develop & Implement Equitable Energy Policies*, GRIST (2014), [http://grist.files.wordpress.com/2014/11/2014whitepaper\\_energy-3.pdf](http://grist.files.wordpress.com/2014/11/2014whitepaper_energy-3.pdf) [http://perma.cc/GY4D-BY8S].

By some accounts, these efforts, and resulting state reforms, have taken a significant toll on the blossoming residential solar industry.<sup>110</sup> Almost every state is reconsidering its approach to solar customers, and several states have already decided to “phase out net metering,” while others have increased solar customer fees.<sup>111</sup>

#### b. Subsidies for Electric Cars

Similar criticisms can also be leveled against subsidies for electric or natural-gas vehicles that produce less greenhouse gas emissions than typical gasoline-fueled cars. While straight subsidies for the purchase of cleaner cars might not have obvious distributional effects, drivers of such cars pay less gasoline tax, which is used in many states to subsidize road building and maintenance. Such subsidies might eventually lead to higher gasoline taxes or other increased road fees, which in turn leads to higher transportation costs for those who cannot afford more expensive electric or natural gas vehicles.<sup>112</sup> In some states, owners of cleaner cars pay reduced licensing and registration fees, money that is also often directed

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110. Tabuchi, *supra* note 107 (noting that “rooftop solar panel installations have seen explosive growth” in recent years but that new installations are “projected [to] decline” by two percent in 2017, a “decline [that has] coincided with a concerted and well-funded lobbying campaign by traditional utilities, which have been working in state capitals across the country to reverse incentives [created by net metering] for homeowners to install solar panels”); *id.* (arguing that utility company efforts have “met with considerable success, dimming the prospects for renewable energy across the United States”); *see also* Joby Warrick, *Utilities Wage Campaign Against Rooftop Solar*, WASH. POST (Mar. 17, 2015), [http://www.washingtonpost.com/national/health-science/utilities-sensing-threat-put-squeeze-on-booming-solar-roof-industry/2015/03/07/2d916f88-c1c9-11e4-ad5c-3b8ce89f1b89\\_story.html](http://www.washingtonpost.com/national/health-science/utilities-sensing-threat-put-squeeze-on-booming-solar-roof-industry/2015/03/07/2d916f88-c1c9-11e4-ad5c-3b8ce89f1b89_story.html) [<http://perma.cc/5D5K-REZC>].
  111. Tabuchi, *supra* note 107 (“Since 2013, Hawaii, Nevada, Arizona, Maine and Indiana have decided to phase out net metering.”).
  112. Even with current federal tax credits, the upfront purchase price of most electric cars still exceeds that of standard, internal-combustion-engine cars. *See, e.g.*, Zach McDonald, *How Long Does It Take To Recoup the Extra Cost of an Electric Car?*, EV INDUSTRY (June 16, 2016), <http://www.fleetcarma.com/miles-recoup-cost-electric-car> [<http://perma.cc/G25H-ENHC>].

to road construction and repair.<sup>113</sup> Thus, similar to the case of net metering, less affluent car owners may be paying more to maintain the transportation grid than more affluent owners who purchase cleaner cars, even though all cars inflict relatively equal wear and tear on roads. Of course, as the price of cleaner vehicles declines, these distributive concerns may be allayed.

c. Ethanol Subsidies

Over the last several decades, the United States and other countries have—through a combination of subsidies and mandates—propelled tremendous growth in the production of biofuels, which have been viewed as a cleaner, renewable alternative to fossil fuels.<sup>114</sup> While the environmental benefits of biofuels have been the subject of debate,<sup>115</sup> expanded biofuel production has had a clear impact on corn markets, as a considerable percentage of corn has been diverted from food markets to ethanol production.<sup>116</sup> While the extent of the resulting pressure on food prices is disputed, a meta-analysis of recent studies on the issue estimated that “each billion-gallon expansion in ethanol production yields a 2-3 percent increase in corn prices on average across studies.”<sup>117</sup> The meta-analysis also found that “biofuels expansion will raise the number of people at risk of hunger or in poverty in developing countries.”<sup>118</sup>

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113. See, e.g., Katy Murphy, *Pothole Relief? California Deal Includes 12-Cent Gas Tax Hike, Electric Car Fee*, MERCURY NEWS (Mar. 30, 2017, 8:43 AM), <http://www.mercurynews.com/2017/03/29/california-lawmakers-nearing-major-deal-to-pay-for-road-fixes> [<http://perma.cc/7UCA-8F8Y>].

114. Nicole Condon et al., *Impacts of Ethanol Policy on Corn Prices: A Review and Meta-Analysis of Recent Evidence*, NAT'L CTR. FOR ENV'T ECON., No. 13-05 at 2 (Oct. 2013), [http://www.epa.gov/sites/production/files/2014-12/documents/impacts\\_of\\_ethanol\\_policy\\_on\\_corn\\_prices.pdf](http://www.epa.gov/sites/production/files/2014-12/documents/impacts_of_ethanol_policy_on_corn_prices.pdf) [<http://perma.cc/67FW-LQKC>].

115. See, e.g., Kevin Bullis, *Do Biofuels Reduce Greenhouse Gases*, MIT TECH. REV. (May 20, 2011), <http://www.technologyreview.com/s/424050/do-biofuels-reduce-greenhouse-gases> [<http://perma.cc/5RWR-E54J>].

116. Condon et al., *supra* note 114, at 1.

117. *Id.*

118. *Id.*



### 3. Environmental Mandates that Increase the Cost of Essential Goods for the Poor

An extensive array of environmental mandates—most designed for pollution control—may also hurt the poor and vulnerable by increasing the cost of necessary goods and services. For example, bans or restrictions on wood-burning stoves that are aimed at reducing air pollution—including particulate matter pollution—may eliminate an important source of relatively cheap winter heat for low-income and rural residents.<sup>119</sup> Similarly, bans or restrictions on artificial fertilizers, pesticides, herbicides, and genetically-modified crops may also hurt the poor by driving up the cost of food.<sup>120</sup> More stringent environmental regulation of power plants may increase the price of energy. There is also some evidence that energy efficiency standards for automobiles and household appliances may be “more regressive than energy taxes,” such as a carbon tax.<sup>121</sup>

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We could continue describing examples of the disproportionate burdens that environmental protection can impose on poor communities and communities of color, but these examples give some sense of the breadth and depth of the problem. The scope and variety of the problem suggest that we ought to at least consider ways to think more systematically about these kinds of issues. In the next Part, we expand on

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119. See, e.g., Barbara Christiansen, *Utah County Residents Oppose Ban on Wood Burning*, DAILY HERALD (Jan. 29, 2015), [http://www.heraldextra.com/news/local/utah-county-residents-oppose-ban-on-wood-burning/article\\_90d448a4-796d-536e-8ca6-3c36aafcb46b.html](http://www.heraldextra.com/news/local/utah-county-residents-oppose-ban-on-wood-burning/article_90d448a4-796d-536e-8ca6-3c36aafcb46b.html) [<http://perma.cc/3BYS-FPR8>] (noting that some residents opposed Utah’s wood-burning restrictions because “they cannot afford natural gas or the more expensive propane”).

120. Peter S. Wenz, *Does Environmentalism Promote Injustice for the Poor?*, in ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM, *supra* note 18, at 57, 59-60 (recounting arguments that “environmentalist opposition to agribusiness harms the poor”).

121. Arik Levinson, *Energy Efficiency Standards Are More Regressive than Energy Taxes: Theory and Evidence* 1-2 (Nat’l Bureau of Econ. Research, Working Paper No. 22956 Dec. 2016), <http://faculty.georgetown.edu/aml6/pdfs&zip/s/RegressiveMandates.pdf> [<http://perma.cc/8KMT-DD3D>] (arguing that energy efficiency standards and energy taxes both “make poor households worse off,” “but the burden of energy taxes falls relatively less on poor households than the burden of efficiency standards”).

the reasons that the impacts of environmental protection on the poor should be given fuller consideration.

#### IV. WHY JUST ENVIRONMENTALISM

As we noted earlier, the just environmentalism project is very much in its beginning stages, and we recognize that a project like this is not without its risks. Broadening notions of environmental justice to consider the disproportionate impacts of environmental protection on the vulnerable may risk diverting environmental justice from its core mission and bog environmental advocates down in seemingly insoluble, longstanding debates about the clash between environmental values and economic progress. It also raises the possibility that those who oppose environmental protection for reasons other than just environmentalism will strategically embrace it to cloak less publicly acceptable reasons for opposing environmental protection, such as personal gain. However, we believe that engaging these debates is critical to being true to the core values of environmental justice. Additionally, from a more practical standpoint, we believe it is likewise critical to building broader coalitions and to continuing to make progress on many environmental protection fronts. Subsection IV.A suggests five reasons why environmentalists should consider this reconceptualization of environmental justice. Subsection IV.B then takes up some of the likely objections to just environmentalism.

##### *A. The Case for Just Environmentalism*

The arguments for just environmentalism range from philosophical and ethical arguments to matters of practical politics.<sup>122</sup> In this Section, we highlight five rationales that favor a more just environmentalism: the growing incidence and diversity of issues implicating just environmentalism concerns; the need to substantiate the justice component of environmental justice; the provision of guidance for

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122. We recognize that including arguments about politics and strategy opens us up to charges that we care about just environmentalism only for its instrumental value, rather than its potential to achieve justice. Nonetheless, given the critical challenges facing our planet, we feel it is important to explore the comprehensive case for (and against) just environmentalism, rather than focusing on justice issues alone.

choosing between competing environmental protection measures with similar overall costs and benefits; the potential to enhance environmental protections by reducing political opposition; and the avoidance of suboptimal environmental protection measures chosen precisely because they burden the vulnerable more heavily than the rich.

First, as the examples in Part III suggest, the situations in which environmental protection imposes disproportionate costs on the poor and vulnerable are both common and diverse. The wide range of circumstances and the frequency with which these problems appear together suggest the need to develop not only a conceptual framework but also practical tools to manage these conflicts between environmental protection and social justice.

Second, broadening environmental justice to account for the costs that environmental protection imposes on the vulnerable is necessary if we are going to take seriously the justice part of environmental justice. One could, of course, conclude that when environmental values clash with justice values, environmental justice should favor environmental values. That would not make environmental justice an empty concept because it might still suggest, for example, the way that existing environmental problems should be prioritized: other things being equal, we should prioritize those environmental problems that impose particular, disproportionate hardships on vulnerable communities.

We would suggest, however, that the justice component of environmental justice should mean something more. The same moral and ethical concerns for social justice that have motivated environmental justice from its inception suggest the need for particular attention to the interests of the poor, even when they appear to conflict with environmental protection. As environmental and disaster law scholar Lloyd Burton has argued in the context of forest preservation:

A policy favoring the preservation of ancient forests and the life forms that inhabit them must also ameliorate its effects on those whose livelihoods depend on the availability of (usually low-paid and relatively hazardous) forest products jobs. To do otherwise robs public policy of moral force; it sets emerging concerns with environmental ethics squarely at odds with the welfare of people at the economic margin, who have few or no alternatives to employment in resource-extractive industries.<sup>123</sup>

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123. LLOYD BURTON, *AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW* ix (1991).

Most accounts of environmental justice draw primarily on two important facets of justice: distributive justice and procedural justice.<sup>124</sup> Distributive justice suggests that the burdens and benefits of “social cooperation” should be distributed according to some principle of justice. While acknowledging that “[j]ustice is a disputed concept,”<sup>125</sup> Peter Wenz argues that “[i]t is possible... to sidestep the relative merits of... competing conceptions of justice by relying on an uncontroversial principle: justice increases when the benefits and burdens of social cooperation are born equally, except when moral considerations or other values justify greater inequality.”<sup>126</sup>

In most situations that implicate either traditional environmental justice or just environmentalism, it is hard to conceive of any moral considerations that would justify concentrating harms on the poor and otherwise vulnerable, rather than—at the very least—distributing them equally between the vulnerable and the more well-to-do. Indeed, there are good reasons to suggest, as philosopher John Rawls does, that any inequalities in the distribution of goods (including positions of influence and power) are permissible only if they benefit society’s least advantaged.<sup>127</sup> This is Rawls’s famous “difference principle.”<sup>128</sup> In the context of just environmentalism, this suggests, at a bare minimum, that a policy is unjust if it disadvantages—or imposes unequal burdens—on the poor.

Traditional environmental justice recognizes that it is particularly unfair to concentrate the costs of economic development on the poor as

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124. See, e.g., Jamieson, *supra* note 39, at 91.

125. Wenz, *supra* note 120, at 57.

126. *Id.* at 58.

127. JOHN RAWLS, A THEORY OF JUSTICE 167-68 (1971).

128. *Id.* Of course, many people reject the difference principle, but alternative formulations typically include a specific concern for the wellbeing of the poor. For example, Cass Sunstein suggests that society should “ensure that average income... is as high as possible while also making adequate provisions for those at the bottom.” Cass Sunstein, *Why Worry About Inequality?*, KOREA HERALD (May 15, 2014, 8:30 PM), <http://www.korea-herald.com/view.php?ud=20140515001472%20> [<http://perma.cc/M4T8-CZA7>]. This alternative, which Sunstein suggests accords with the views of many people in the U.S., allows for much greater income inequality, but still requires that the least well off have “decent opportunities” and “economic security.” *Id.*

they often reap fewer benefits from that development than do the rich.<sup>129</sup> A similarly stark mismatch occurs when we inflict a disproportionate share of the cost of environmental protection on the poor. Poor communities typically contribute less to environmental degradation as they usually consume less energy and other resources.<sup>130</sup> Accordingly, if the obligation to bear the costs of environmental protection arises at least in part from one's contributions to—and responsibility for—the environmental harm that warranted the intervention, poor communities should typically bear less (not more) of the remedial costs.

The injustice of concentrating the costs of economic protection on the poor and vulnerable is thus exacerbated in many situations because of their limited contribution to the underlying environmental problems.<sup>131</sup> Indeed, this is one of the strongest arguments undergirding climate change justice: those countries that have contributed least to climate change will often suffer not only greater loss and damage from climate change but they are also often asked to make the greatest sacrifices to limit greenhouses gases, from slowing the pace of economic development and energy consumption to foregoing industries and jobs that damage local forests

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129. See, e.g., James K. Boyce & Aseem Shrivastva, *Delhi's Air Pollution Is a Classic Case of Environmental Justice*, GUARDIAN (Mar. 9, 2016, 12:00 AM), <http://www.theguardian.com/sustainable-business/2016/mar/09/delhi-india-air-pollution-environmental-injustice-car-tax> [<http://perma.cc/6J3F-TM7Q>] (arguing that “Delhi’s air pollution... is a classic case of environmental justice”: “[t]he city’s affluent classes reap the lion’s share of the benefits from the activities that poison the air, while less privileged residents bear most of the human health costs”).
130. See, e.g., Burkett, *supra* note 12, at 14 (citing statistics that “African Americans emit 20 percent less greenhouse gases per household”); David Roberts, *The Best Way to Reduce Your Personal Carbon Emissions: Don’t Be Rich*, Vox (Dec. 26, 2017, 8:33 AM), <http://www.vox.com/energy-and-environment/2017/7/14/15963544/climate-change-individual-choices> [<http://perma.cc/BUT9-YWJC>] (noting that “the top 10 percent wealthiest in the U.S. emit more than five times as much CO<sub>2</sub> per person as those on the lower half of the income scale”).
131. Burkett, *supra* note 12, at 187 (arguing that one of “the profound injustices that inhere in climate change’s disproportionate effects” is that “the unequal burden . . . falls on those who have not been primarily responsible for climate change, domestically as well as internationally”); *id.* at 188 (“The distribution of climate change impacts is likely to be increasingly unjust; for that reason, it is imperative that the solutions proffered neither entrench existing vulnerabilities nor introduce new ones.”).

that would otherwise act as carbon sinks. The injustice is arguably multiplied when we consider that vulnerability itself is shaped largely by structural forces, including structural racism, that stack the deck against the poor and racial minorities.

The other important facet of environmental justice—procedural justice—focuses mostly on ensuring that the vulnerable can participate in the decision-making process. Procedural justice can take weaker and stronger forms, including everything from giving affected communities information, to giving them a voice or seat at the table in the decision-making process, to granting the affected parties decisional autonomy—power to make the ultimate decision. Procedural justice helps increase the legitimacy and acceptability of the decision-making by ensuring that affected parties' concerns were heard and considered. As many scholars have argued, "Distributive and procedural justice are often intimately interlinked . . . . Redistribution without empowerment can be short-lived, and empowerment without redistribution can be an insult."<sup>132</sup> These considerations seem equally compelling whether we are addressing the harms of environmental degradation or the harms of environmental protection.

Third, attending to the distribution of the costs of environmental protection might help environmentalists choose between different environmental solutions that have similar benefits and similar overall costs but differing cost distribution. An explicit focus on the distribution of the costs of environmental protection would serve as an important reminder to evaluate and acknowledge the distribution of the costs of environmental protection and to choose solutions that minimize the impacts on vulnerable groups. For example, when choosing between a carbon tax, a gasoline tax, or an energy efficiency standard as potential measures for mitigating greenhouse gases, a focus on distributional effects would suggest that the relative regressivity of each of these policies ought to be a factor in deciding which approach to adopt.<sup>133</sup> Of course, part of this evaluation might also include steps to mitigate the regressivity of the selected policy. Thus, in some cases, distributive justice can be improved without any increase in the cost of environmental protection.

Fourth, as a practical matter, addressing real and perceived conflicts between economic interests and environmental protection would work to

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132. Jouni Paavola, W. Neil Adger & Saleemul Huq, *Multifaceted Justice in Adaptation to Climate Change*, in *FAIRNESS IN ADAPTATION* 263, 264 (2014).

133. See *supra* notes 102, 121 and accompanying text.

reduce political opposition to continued environmental progress and thereby might functionally work to heighten environmental protection. Opponents of environmental protection have effectively painted the EPA as a job-killing agency. Indeed, “mainstream environmental voices have failed to articulate a persuasive alternative to dominant discourses about the relationship between economic well-being and environmental regulation”<sup>134</sup>—discourses that suggest that environmental protection, often imposed by outsiders, will destroy jobs and local economies, leaving affected communities with no recourse. Certainly, there are many ways of understanding what happened in the 2016 presidential election, but one thing that seems clear is that the GOP is attempting to appeal to the segment of voters who feel that efforts to protect the environment hurt them economically.<sup>135</sup> In the current political climate, it seems likely that enduring environmental progress can only be made if the interests of the poor are given voice and weight.

Expanding environmental justice to encompass the costs of environmental protection unlocks possibilities that might work to strengthen existing coalitions and build new coalitions by helping to reassure potential allies that environmental groups genuinely care about the interests of the poor and disadvantaged and are not just using socially

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134. Steve Schwarze, *Silence and Possibilities of Asbestos Activism: Stories from Libby and Beyond*, in ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM, *supra* note 18, at 165, 175.

135. The Republican National Committee, *Energy and Environment*, GOP <http://www.gop.com/issue/energy-and-environment/canonical> [<http://perma.cc/BMP4-67JR>] (last visited Oct. 4, 2018) (stating on energy and the environment that “decades of excessive government regulations and lobbying have cost us tens of billions of dollars, diminished the production of American energy, and wiped out thousands of jobs.”); Mary Jordan & Kevin Sullivan, ‘Smothered’ and ‘Shoved Aside’ in Rural America, WASH. POST (Dec. 29, 2017), [http://www.washingtonpost.com/graphics/2017/national/iowa-farm-waters-trump/?utm\\_term=.7d572db781b3](http://www.washingtonpost.com/graphics/2017/national/iowa-farm-waters-trump/?utm_term=.7d572db781b3) [<http://perma.cc/5NES-UTR7>] (attributing President Trump’s success in rural Iowa during the 2016 presidential election, in part, to a general reaction against environmental regulation in farming communities); Juana Summers, *The ‘Forgotten Tribe’ in West Virginia: Why America’s White Working Class Feels Left Behind*, CNN (Sept. 20, 2016, 9:10 AM), <http://www.cnn.com/2016/09/20/politics/election-2016-white-working-class-donald-trump-kaiser-family-foundation/index.html> [<http://perma.cc/6NV8-8MYL>] (describing the perception among white, working-class Americans in West Virginia’s coal country that regulation of the coal industry represents a serious economic threat).

vulnerable groups as props or pawns to further environmental interests. Environmentalists have long been subject to charges that they exploit vulnerable groups when it suits their interests and abandon them when those interests are in tension. This appearance has, understandably, fostered distrust and even anger in many vulnerable communities who view environmentalists as fickle, unreliable allies at best and traitors and hypocrites at worst.

This critique of environmental justice seems particularly apt in the context of the relationship between environmental justice and indigenous peoples. As Professor Rebècca Tsosie observes, the environmental justice movement has been criticized by tribal leaders for stereotyping tribes as dupes of corporations, victims of federal manipulation, or “noble people who live in harmony with the land.”<sup>136</sup> Such stereotypes disrespect the right to tribal self-determination to resist manipulation and to make sophisticated calculations about resource development. In 2009, for example, lawmakers of the Hopi Tribe in Arizona, supported by leaders of the Navajo tribe, “declared environmental groups unwelcome on the[ir] reservation”<sup>137</sup> because they believed environmentalists were actively undermining the tribe’s economic interests by opposing coal mining.<sup>138</sup> Navajo President Joe Shirley Jr. charged, “Environmentalists are good at identifying problems but poor at identifying feasible solutions . . . . Most often they don’t try to work with us but against us, giving aid and comfort to those opposed to the sovereign decision-making of tribes.”<sup>139</sup>

Conversely, a willingness on the part of environmentalists and policymakers to consider effects on the poor, to respect the voices and input of the vulnerable, and to empower tribal self-determination even when tribal interests do not fully align with environmental protection, may make it less likely that vulnerable communities align themselves with

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136. See Tsosie, *Environmental Justice*, *supra* note 12, at 1630-31.

137. Felicia Fonseca, Associated Press, *Coal Conflict: Hope, Navajo Tribes Say Environmentalists Not Welcome on Reservations*, CLEVELAND (Sept. 30, 2009), [http://www.cleveland.com/nation/index.ssf/2009/09/coal\\_conflict\\_hopi\\_navajo\\_trib.html](http://www.cleveland.com/nation/index.ssf/2009/09/coal_conflict_hopi_navajo_trib.html) [<http://perma.cc/9FLT-35TM>].

138. *Id.*

139. *Id.* Another prominent example of mainstream environmental groups disregarding tribal interests is the national Sierra Club and Friends of the Earth’s vociferous and tenacious opposition to the Havasupai tribe’s persistent efforts to recover some of their tribal lands. See, e.g., Krakoff, *supra* note 12, at 238.



interests opposed to environmental protection.<sup>140</sup> As Professor Robert Bullard has argued, “[U]nless an environmental movement emerges that is capable of addressing these economic concerns, people of color and poor white workers are likely to end up siding with corporate managers in key conflicts concerning the environment.”<sup>141</sup> So, even if achieving justice may reduce environmental protection in some cases, conceding this would allow environmental advocates to build up credibility with communities they often struggle to win over.

In the net metering context, for example, some environmentalists contend that electricity utilities have successfully weaponized social justice interests to protect utility profits by blocking environmental measures.<sup>142</sup> If environmentalists could find approaches that neutralize the just environmentalism concerns created by net metering, they would be better equipped to smoke out the utility companies’ true motivations: whether their aim is to shield low-income customers from unfair burdens or whether it is to limit disruption to the energy sector’s traditional business model by limiting the growth of solar energy. In California, for example, many social justice advocates have supported net metering—rather than joining utility company objections—both because they believe that solar energy, on the whole, benefits vulnerable groups and because of programs fostering minority and low-income participation in the benefits of clean energy.<sup>143</sup>

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140. Cf. Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 15, 23 (Robert D. Bullard ed. 1993) (describing how “[w]orkers of color are especially vulnerable to job blackmail”—in which they are forced to accept jobs that risk their own health and that of their communities—“because of the greater threat of unemployment they face . . . and because of their concentration in low-paying, unskilled, nonunionized occupations”).

141. *Id.*

142. Arturo Carmona, “executive director of Presente.org, the nation’s largest online Latino organizing group” has accused California utility companies of “using Latinos and others who live in middle- and lower-income communities as pawns in a war against rooftop solar.” Arturo Carmona, *Latinos Shouldn’t Be Pawns in Fight Over Rooftop Solar Power*, SACRAMENTO BEE (Nov. 11, 2014 4:00 PM), <http://www.sacbee.com/opinion/oped/soapbox/article3788314.html>, [<http://perma.cc/CL89-HT5P>].

143. See, e.g., Susannah Churchill, *Social Justice Groups Urge California PUC to Extend Net Metering*, VOTE SOLAR (Mar. 10, 2015), <http://votesolar.org/net->

Encouraging environmentalists to evaluate and consider these costs—and to work with affected groups as part of their core mission—might also result in the creation of win-win solutions (or, as Professors Hari Osofsky and Jacqueline Peel have characterized them, “going together solutions”<sup>144</sup>) that would otherwise escape consideration. Working together with vulnerable groups, not just to increase environmental protection but to ensure that the related costs are not borne disproportionately by the vulnerable—may help parties to identify and develop new solutions that minimize the effects on vulnerable communities. Thus, identifying and acknowledging situations in which current solutions are win-lose might help policymakers, in consultation with affected groups, figure out whether there are alternative approaches that are win-win. For example, the regressive impacts of energy taxes or net metering policies might be mitigated by weatherization initiatives in low-income communities that would decrease both energy use and home heating bills.

One potential rejoinder to the argument that environmental justice ought to account for the costs that environmental protection imposes on the poor is that when the interests of environmental protection and the needs of the socially vulnerable diverge, it is usually (though not always) in cases in which the needs of the poor for jobs and economic development coincide with the interests of more economically powerful groups, such as large corporations. To the extent that environmental justice is conceived primarily as providing justice and redress to those who lack power to ensure that their needs are accounted for, perhaps that impetus is absent, or at least attenuated, when powerful corporations can act as proxies for the economic needs of the poor.

This rejoinder is not fully persuasive, however, because even substantial alignment between the needs of the vulnerable and the interests of powerful groups is not the same as the vulnerable being able to access and exercise power on their own behalf. Moreover, the interests

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metering-rates/california-social-justice [<http://perma.cc/4HDS-3SPU>] (“We urge the Commission to continue making net metering available to customers who go solar after the current cap is reached and to explore innovative additional approaches—including virtual net metering, community shared renewables, new tariffs and workforce development programs—to help more low-income families and communities of color participate in and benefit from California’s growing clean energy economy.”).

144. Hari M. Osofsky & Jacqueline Peel, *Energy Partisanship*, 65 EMORY L. J. 695, 721 (2016).

of the poor may diverge in important ways from the interests of the corporations that provide them jobs.<sup>145</sup> Coal companies, for example, have an interest in their own profits and in preserving that profit stream in perpetuity. Coal miners, in contrast, have an interest in continued jobs and may prefer the jobs that coal companies have traditionally provided. At least some of the coal miners' economic interests, however, might be satisfied by job retraining, access to other types of education, or the growth of other economic sectors (and concomitant job opportunities) in their geographic region. In the long term, coal miners' economic interests might be better satisfied by some of these alternative solutions, but these solutions provide essentially no upside for coal companies, who thus have no incentive to advocate for them.

Fifth, failure to account for the disproportionate impacts of environmental protection on the poor may lead to suboptimal environmental policies. If there is no obligation and no mechanism in environmental law to allow compensation to the poor in at least some cases in which they are disproportionately burdened by environmental protection efforts, such efforts may well be designed to concentrate burdens on the poor rather than on other groups precisely because they are poor and presumably will have less capacity and less influence to resist those measures. Thus, this route represents the path-of-least-resistance for getting the measure enacted. This is problematic not only from a justice perspective but also because a measure that burdens the poor may be less efficient or effective than ones with other distributional consequences. As Professor Barton Thompson has written in the context of whether property owners ought to be compensated for harms that endangered species protection imposes on them:

[A] no compensation rule will also encourage property owners to oppose new listings of endangered species, undermining all recovery efforts for those species. A no compensation rule biases those species-recovery efforts that do occur toward property-focused efforts and, because property owners vary among themselves in the political power they enjoy, distorts which

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145. Cf. Bullard, *supra* note 140, at 23 (noting that on many environmental issues an "inherent conflict exists between the interests of capital and that of labor," but that "workers of color" are often forced to compromise their interests to avoid unemployment": "Workers will tell you that 'unemployment and poverty are also hazardous to one's health.'").

property is used for habitat preservation and which landowners bear the burden of preservation.<sup>146</sup>

Without some special attention to the burdens that environmental protection measures impose on the vulnerable, we would expect that environmental protection will often be implemented in ways that particularly burden the vulnerable even when there are more effective, more efficient approaches that would instead burden wealthier individuals and communities.<sup>147</sup> Considering and accounting for the costs an environmental protection measure imposes on the poor helps prevent this “distortion” in the structure and enforcement of environmental law.

### *B. Objections to Just Environmentalism*

A fair examination of the case for just environmentalism also requires confronting likely objections. This Section explores an array of arguments that critics might level against this expansion of environmental justice.

First, there are a number of standard criticisms of either environmental justice generally or of the mainstreaming of environmental justice into the work of more traditional environmentalists. For example, one objection to the incorporation of environmental justice into environmental law and policymaking—an objection that applies equally to traditional environmental justice and our conception of just environmentalism—is made by economists like Louis Kaplow and Steven Shavell, who argue that justice concerns are more efficiently addressed, not on a case-by-case basis by altering individual laws and policies, but instead through targeted redistribution using taxation and government welfare programs.<sup>148</sup> Such claims would be more persuasive, however, if

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146. Barton H. Thompson, *The Endangered Species Act: A Case Study in Takings and Incentives*, 49 STAN. L. REV. 305, 375 (1997).

147. For example, a city might decide to pursue water conservation by significantly increasing the cost of water for homeowners, including low-income homeowners, rather than targeting water waste at golf courses or other amenities that typically serve the more well-to-do, even if targeting those amenities would be a more effective, efficient way to conserve water.

148. Louis Kaplow & Steven Shavell, *Fairness v. Welfare*, 114 HARV. L. REV. 961, 993-94 (2001) (arguing that “when legal rules do have distributive effects, the effects usually should not be counted as favoring or disfavoring the rules because distributional objectives can often be best accomplished directly, using the income tax and transfer (welfare) programs” and that “[o]ne

the U.S. were, in fact, committed to providing a robust safety net for the poor. Moreover, some of the kinds of harms—to cultures, way of life, and religious practice—may not be effectively remedied by monetary compensation and thus must be considered more fully in the formulation of the relevant environmental policies.<sup>149</sup>

While consideration of all the potential objections to environmental justice is outside of the scope of this paper, some of the standard criticisms of mainstreaming environmental justice arguably apply with particular force to the expansion of environmental justice to conflicts between environmental protection and the interests of vulnerable groups. In particular, some critics of mainstreaming environmental justice contend that environmental justice is too anthropocentric<sup>150</sup>—valuing the environment in purely human terms and elevating human interests, thus neglecting the inherent value of preserving nature itself, including plants and animals.<sup>151</sup> Such critics likewise contend that human “culture is often

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reason economists have tended to favor these direct means of redistribution is that they reach all individuals and are based explicitly on income.”).

149. See, e.g., Tsosie, *Environmental Justice*, *supra* note 12, at 1625, 1645 (observing that “tort-based theories of compensation for the harms of climate change have only limited capacity to address the concerns of indigenous peoples” and asserting that some schemes for compensation and relocation are “of little assistance to indigenous peoples” in part because of the primacy of place to indigenous culture).
150. Both environmental justice and some strains of mainstream environmentalism can be characterized as anthropocentric. See Wenz, *supra* note 120, at 58 (explaining that “[a]nthropocentric environmentalism centers on the belief that industrial societies are destroying natural resources and processes upon which human flourishing depends” whereas “[n]onanthropocentric environmentalists believe additionally that, even when human welfare is unaffected, people should protect species from extinction, ecosystems from degradation, and nonhuman animals from cruelty”).
151. Thus, for example, Professor Kevin Deluca asserts that to fully embrace environmental justice as a lodestar of environmental policy is to indulge “a most pernicious form of anthropocentrism, wherein only human interests count.” Kevin M. Deluca, *A Wilderness Environmentalism Manifesto: Contesting the Infinite Self-Absorption of Humans*, in ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM, *supra* note 18, at 31; see also *id.* at 43 (arguing that true “[w]ilderness environmentalism holds out hope from the multiple anthropocentric worldviews”—such as environmental justice—“that have done enough harm”); *id.* at 34 (contending that “abandoning wilderness and

the problem and should not be a trump card used to stop protecting species and ecosystems.”<sup>152</sup>

One need not necessarily put humans first, however, to argue that we ought to think carefully about addressing the harms suffered by people as a result of environmental protection. Just because one worries about human suffering does not mean that the suffering of other species is not taken into account. Indeed, while we personally believe that the harm to people may be so great in some contexts that it would be morally unjust to pursue particular environmental protection measures, nothing about the broader notion of just environmentalism would necessarily reduce environmental protection. Rather, as discussed in greater length below, justice in this context may merely require procedural and substantive protections for those who are truly vulnerable.

To be clear, we do not argue that every harm related to environmental protection needs to be addressed. In considering which and whose harms count in this context, we primarily suggest compensating the truly vulnerable who may suffer significant harms.<sup>153</sup> Just environmentalism does not mean that we must compensate, the “big business”<sup>154</sup> of environmental devastation. However, when people within that industry are truly vulnerable, and especially when the impact on them is substantial, the argument for some sort of protection or compensation for that subgroup begins to gain strength.

Second, environmentalists might be concerned that expanding environmental justice claims to include the disproportionate harms of environmental protection might result in too little environmental protection. In the traditional environmental justice situation—in which the costs of environmental degradation are concentrated on the poor—richer, more privileged elites who have outsized voice and power in determining environmental policy might be inclined to “buy” too much environmental

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environmental protection as a first principle leads environmental groups to abandon environmental criteria as a means of judging practices and policies” and to substitute instead environmental justice’s explicit prioritization of “human, cultural, and economic concerns over environmental concerns”).

152. *Id.* at 31. Indeed, Deluca insists that “environmental justice responses to protecting endangered species represent another damaging aspect of human self-absorption,” *id.*, and that “[p]utting humans always first is a crucial cause of the environmental crisis we now face,” *id.* at 34.

153. *See infra* Section V.A.

154. Deluca, *supra* note 151, at 31.

degradation because at least some of the cost of that degradation is externalized to the vulnerable, who often lack political power. Thus, recognizing traditional environmental concerns and granting increased participation and power to vulnerable groups is likely to result, in more overall environmental protection.<sup>155</sup>

Conversely, if the costs of environmental protection are concentrated on the poor, then richer, more privileged groups will arguably “buy” too much environmental protection—or, in any event, more than they would otherwise be inclined to purchase—because some of the associated costs are externalized to the vulnerable. Requiring internalization of some of those costs—by, for example, directing targeted subsidies to the poor who are harmed by the environmental measures, may increase the cost of environmental protection and thus decrease the overall level of protection. Environmentalists might therefore be reluctant to recognize these types of just environmentalism claims, especially given that society may already “underbuy” environmental protection because of the political dynamics that exist when the benefits of environmental protection are diffuse but the costs are concentrated on a discrete number of industrial players.<sup>156</sup> Environmentalists might also point out that particularly expansive notions of procedural environmental justice in this context—especially approaches that recognize some groups’ decision-making autonomy—might block some kinds of environmental protection altogether.

While we cannot deny that taking just environmentalism seriously would potentially modify or even decrease some environmental protection

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155. Cf. Bullard, *supra* note 140, at 23-24 (internal quotation marks and citations omitted) (arguing that “[t]he environmental crisis can simply not be solved effectively without social justice” because “whenever [an] in group directly and exclusively benefits from its own overuse of a shared resource but the costs of that overuse are shared by out-groups, then in group motivation toward a policy of resource conservation . . . is undermined”). Of course, in some sense, environmental justice claims could also be addressed by increasing the costs environmental degradation inflicts on the rich—thereby equalizing the burdens. This approach might actually increase the amount of environmental damage. So understood, environmental justice would have “limited efficacy” because the “end result is to have all residents poisoned to the same perilous degree, regardless of race, color or class.” Faber, *supra* note 18, at 145. In any event, it is unlikely that elites who hold the reins of power would ever pursue such a course of action.

156. See, e.g., TIMOTHY M. SWANSON, *THE ECONOMICS AND ECOLOGY OF BIODIVERSITY DECLINE* 19 (1998).

measures, it is nonetheless important to recognize that addressing these just environmentalism claims does not actually make environmental protection more expensive. Instead, it focuses attention on who bears those costs and potentially shifts those burdens to achieve a more just distribution.<sup>157</sup> Of course, that might nonetheless result in less environmental protection if the politically powerful are unwilling to bear a fuller share of those costs. It is nonetheless possible that some politically powerful groups will be willing to pay more for environmental protection if justice requires them to do so. Moreover, as discussed earlier, a more just environmentalism may win over many poorer communities and voters to the environmental cause, forging broader coalitions who support environmental protection measures. The environmental protection policies that emerge from these broader coalitions are also more likely to be resilient and sustainable in the long term, even as control of environmental policy shifts from party to party and administration to administration.

The related concern that just environmentalism solutions recognizing decision-making autonomy might completely thwart some environmental protection can presumably be mitigated, though not completely eliminated, by careful consideration of the kinds of situations in which it is appropriate to recognize decision-making autonomy. Additionally, giving fuller voice to the vulnerable who are impacted by proposed environmental protection measures—and even giving them potential veto power over certain decisions—may create incentives for innovation and the development of more win-win solutions that move environmental protection forward while protecting the economic interests of the most vulnerable.

A third and related objection to just environmentalism might be that focusing on the harm that environmental protection does to the present population will skew environmental policy in ways that do serious damage to the ability of future generations both to inherit a healthy planet and to make a reasonable living. Thus, alleviating disproportionate burdens on the vulnerable today might simply shift even more disproportionate burdens onto tomorrow's vulnerable, as well as members of future generations, more generally. One obvious answer to this critique is that just environmentalism must be concerned with the harms to future

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157. Of course, there may be costs associated both with gathering and providing information and with increased participation and procedural protections for vulnerable groups.



generations, as well as to current ones. Nonetheless, this objection retains some force because, try as we might, it is far more difficult to give future generations a seat at the table and to adequately value their interests.<sup>158</sup> An even stronger version of this objection might suggest that the harm to future generations from current and impending environmental crises—particularly those associated with climate change—should outweigh any harms to current generations because those harms are likely to be both severe and irreversible.<sup>159</sup> Such a critic might also point out that, given these growing challenges, many job and cultural losses are inevitable, in any event, if not in this generation, then in the foreseeable future.<sup>160</sup>

Applying principles of just environmentalism, however, is itself a way to begin to protect future generations of vulnerable people. If we establish a strong precedent for respecting the rights of the poor and vulnerable today, marginalized groups are more likely to be able to call on the same protection in the future and perhaps even build on it. Thus, by enshrining concern for the most vulnerable among us in environmental policy, we are taking a meaningful step in protecting tomorrow's vulnerable by the mere declaration today that their rights and needs matter. The stronger and more meaningful the declaration is today, the stronger and more meaningful the protections that follow in the future will be.

Moreover, even if these critics are right, and perhaps particularly if they are right, increasing the justice of environmental policies like climate change mitigation is imperative. The United States is currently at an impasse on many of today's most pressing environmental problems, including climate change. At least part of the reason for this is that those who fear the social and economic downsides of environmental solutions stand in the way. A commitment to just environmentalism may be the very thing needed to help assuage the concerns of many who are currently

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158. See Jamieson, *supra* note 39, at 92 ("Poor people and those at the margins are not alone in being disenfranchised. Future generations are not at the table to defend their interests, and the use of standard decision-theoretic tools such as the discount rate are often used to effectively dismiss even their most important interests.").

159. See, e.g., *id.* at 35 (arguing that "the world is facing a catastrophe of historic and unique proportions" and that "humans are threatening the vital signs of planetary health in a manner and scale unprecedented in human history").

160. See, e.g., Editorial, *Using the E.P.A. To Prop Up Big Coal*, N.Y. TIMES (Sept. 18, 2017), <http://www.nytimes.com/2017/09/18/opinion/using-the-epa-to-prop-up-big-coal.html> [<http://perma.cc/D4UU-RL84>].

opposed to more stringent environmental protection policies, to start conversations that help identify win-win solutions, and to build broader coalitions favoring action on climate change and other critical issues. So, while it would be naïve not to recognize the risk of just environmentalism being strategically used to stall progress, it is also naïve to think that failing to address the downsides of environmental protection will somehow make environmental protection more palatable to those standing in the way. Moreover, just environmentalism may not require compensation for all disproportionate burdens on the current generation or otherwise preclude environmental measures that damage cultural or economic interests. It would, however, require considering and perhaps addressing those harms that fall disproportionately on the most vulnerable. This would not only increase the fairness of the policies but also deprive more elite interests of the ability to strategically focus on these sympathetic cases in pushing against environmental protection. So, while we concede that the degree of harm to current residents will sometimes have to be weighed against the seriousness of the environmental problem being addressed and the extent to which the proposed solution mitigates those adverse environmental consequences, this does not mean that this consideration will make environmental protection more difficult; it may in fact make it more politically feasible.

Fourth, some scholars might contend that just environmentalism is not compelling because there are few true conflicts between the economic interests of the vulnerable and environmental protection.<sup>161</sup> However, many scholars who discount the possibility of such conflicts do so by focusing on the costs and benefits of any given environmental protection measure to the poor as a whole, discounting or ignoring entirely the harms to particular poor individuals or communities.<sup>162</sup> Similarly, those who assert that there are few true conflicts often seem to focus on the long-term well-being of the poor, discounting transition costs while, for

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161. For example, Peter Wenz, an environmental ethicist who authored some of the earliest scholarly works on environmental justice, argues that although the environmental movement is often accused of hurting the poor and vulnerable, cases of “genuine conflict” are “rare,” and that “[m]ost cases of apparent conflict . . . result from faulty analyses and correctable errors in environmental policies.” Wenz, *supra* note 120, at 57.

162. Thus, for example, Wenz argues that “[e]nvironmentalists generally favor improved efficiency so that people can get what they want with less environmental disruption,” and “[i]mproving efficiency typically helps poor people most.” *Id.* at 64.

example, a city develops a better public transit system or transitions to a clean energy economy.<sup>163</sup> Most importantly, scholars often dispute the existence of conflicts between environmental protection and the economic needs of the poor by suggesting tweaks to environmental policy that include specific steps to address distributional inequities.<sup>164</sup> Of course, rather than being arguments against just environmentalism, these are exactly the kind of mitigation efforts one might expect to emerge from a robust application of just environmentalism to potential conflicts between environmentalism and the interests of the poor.<sup>165</sup>

## V. LOOKING AHEAD

The critics of environmental law have used the connection between environmental protection and social justice to attack the environmental movement for decades. The reason that the critics' case has proven so salient is that there is some truth to it.

The fact that environmental protection can have some negative consequences for vulnerable people should be conceded and, where justice requires it, also addressed. We can and ought to expand our commitment to justice on behalf of the vulnerable, including those who have been made more vulnerable by the pursuit of environmental protection, even if at times it results in a modified vision of environmental protection.

We can, and should, work toward a more just environmentalism. But embracing the endeavor is but the first step in a difficult pursuit. Achieving a more just environmentalism is easier said than done. Grappling with just

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163. See *id.* at 65-66.

164. Thus, for instance, Wenz suggests that "[i]f sustainably grown food is more expensive than most food that is currently available, the government should increase subsidies that help poor people buy sustainably grown food. This requirement of justice does not run afoul of any environmental agenda." *Id.* at 70. In a similar vein, he argues that "most plans for species preservation in Third World nature reserves include provision for poor people in the area to benefit from the reserve, such as through ecotourism." *Id.* at 77; see also *id.* (arguing that if development threatens tigers in India, "justice suggests that the people who caused and continued to benefit from the problem, people involved in economic development, incur the loss. They, not indigenous people, should withdraw to make room for the tigers.").

165. Indeed, Wenz himself recognizes as much, arguing that "[i]n most cases the goals of environmentalism can be achieved in ways that do not compromise, but in fact promote, justice." *Id.* at 78.

environmentalism presents daunting challenges and raises some difficult questions—and some of these challenges and questions are quite different from those raised by traditional environmental justice. This concluding Part seeks to identify those challenges and questions. We use this Part to begin important conversations that a more just environmentalism will require. We view it as an invitation for more in-depth conversations going forward.

While we do not intend to start all the relevant conversations, we hope to begin some of the most difficult. The questions we raise below include: whose harms count, what harms count, what does justice require in this context, and, finally, what challenges do existing institutions pose to just environmentalism?

### A. *Whose Harms Count?*

While many of the questions about whose harms count are common both to environmental justice and just environmentalism, achieving just environmentalism is going to require us to think more carefully about the appropriate unit of analysis: whether we should consider harms to vulnerable communities as a whole, or whether we should focus more specifically on vulnerable individuals.

In the more traditional context, environmental justice scholars generally agree that it is vulnerable populations—particularly racial minorities, indigenous communities, and the poor—whose interests are the focus of environmental justice concerns.<sup>166</sup> Yet, in traditional environmental justice problems—such as siting decisions or claims that environmental laws are being insufficiently enforced in some areas—the people who are harmed tend to be organized geographically. The default unit of analysis for environmental justice, then, tends to be a geographically defined community. Moreover, there is usually no reason to parse this unit of analysis more finely, as everyone in the area benefits when the air is less toxic and the water is cleaner because air and water are quintessential public goods. If the community as a whole is considered sufficiently vulnerable to trigger environmental justice concerns, there is simply no need to ask whether some members of the affected community

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166. Kim Allen, Vinci Daro & Dorothy C. Holland, *Becoming an Environmental Justice Activist*, in ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM, *supra* note 18, at 105, 128; *see also* Tsosie, *Environmental Justice*, *supra* note 12, at 1625.

are more vulnerable than others because all will necessarily benefit if environmental justice is achieved.<sup>167</sup>

Geography, of course, continues to play an important role in determining who is harmed under a just environmentalism assessment. However, just environmentalism demands more flexibility in identifying harms and in encompassing the harms to vulnerable individuals as well as to vulnerable communities as a whole. For example, when a national monument designation prohibits oil and mining in certain areas, the economic interests that are harmed are likely to be located near that monument designation. However, the costs of such conservation measures will likely be experienced differently even by those who live in close proximity to the resource. Frequently, what will differentiate the experiences of different community members will be the connection between their livelihoods and cultures and a conserved resource. Logging bans have ripple effects that may affect entire communities, but it is the loggers themselves (and the logging companies) who are most directly impacted.

Just environmentalism solutions enhance the capacity to focus on those loggers who are truly vulnerable and disadvantaged—those surviving at the margins—because policy rather than geography can guide our mitigation efforts. This is particularly so when we focus on monetary harms: because money is not a public good, compensatory payments can be targeted only to individuals who meet some threshold criteria of need or vulnerability. We could decide, for instance, to make compensatory payments to loggers but not logging companies, or to make payments only to loggers living below the federal poverty line.<sup>168</sup> These choices suggest that just environmentalism has a greater capacity to focus on individuals

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167. Some members of the community—those who live in closer geographical proximity to the polluting use—will likely benefit more if the polluter is excluded or regulated, but that distribution of benefits is dictated by geography, not by any particular assessment of vulnerability.

168. Of course, if the primary harms and the primary compensation take the form of something other than money, this kind of targeted remedy might be more difficult. For example, if the loggers' primary claim of harm was to their culture and way of life, it is more difficult to imagine how one could craft remedies to help preserve that way of life that would exclude more affluent loggers. However, many of the examples of just environmentalism detailed in Part III—such as environmental taxes and subsidies—involve primarily or only money and do not really tread on culture or other interests within communities.

and thus may require, or at least allow, more particularized, individual line-drawing about who qualifies as vulnerable than in traditional environmental justice cases, which typically focus more on the vulnerability of affected communities as a whole.<sup>169</sup>

The just environmentalism inquiry also asks us to examine what kind of trade-offs between group and individual interests are appropriate and whether the unit of analysis should be individuals or vulnerable groups as a whole.<sup>170</sup> Is it appropriate to either discount or ignore entirely the

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169. That the potential for targeted, individual remedies is likely to be more limited in cases of race than income might have consequences for whether we pay more attention to race-based or poverty-based vulnerability, an issue that has been hotly contested. Whether such a focus is appropriate or not is an important question. In some ways, an inquiry into individual vulnerability might feel unsatisfying and incomplete, as vulnerability may, in some respects, be more contextual and more tied to community than can be captured in case-by-case decision-making or by rules that focus on assessing an individual's situation. However, the focus on individual vulnerability may allow us to direct compensation where it will do the most good.
170. Of course, the question of trade-offs surfaces in traditional environmental justice cases as well. Indeed, one criticism of the environmental justice movement is that when advocates manage to keep an undesirable use out of a particular neighborhood, it just ends up being built in another neighborhood—and usually one that is also heavily minority and poor. Faber, *supra* note 18, at 145. Nevertheless, these questions of trading off the interests of some vulnerable people against the interests of others—essentially just shifting the environmental-harm burden to a different but similarly situated neighborhood—are usually in the background of individual environmental justice fights and more implicit than explicit. Moreover, trade-off questions can seem less pressing in the traditional siting context because they are often answered by asserting that the ultimate goal of environmental justice is to decrease pollution, not just to redistribute it. *See id.* (“The struggle for environmental justice must be about the politics of production per se and the elimination of the ecological threat, not just the ‘fair’ distribution of ecological hazards . . . .”); *see also id.* (“Any attempt to rectify distributional inequities without attacking the fundamental processes that produce the problems in the first place focuses on symptoms rather than causes and is therefore only a partial, temporary, and necessarily incomplete and insufficient solution.”). Thus, the competing interests of different communities are reconciled by having less environmental harm to distribute. In contrast, few environmentalists are likely to reconcile the competing interests often at stake in just environmentalism by advocating for less environmental protection—indeed doing so does not reconcile the

interests of at least some socially vulnerable individuals so long as the environmental protection is good for the socially disadvantaged, taken as a whole? A common refrain when addressing an allegation that vulnerable people are bearing a disproportionate share of the cost of environmental protection is that the benefits to vulnerable people as a whole outweigh the costs being imposed on some individuals. Thus, a frequent assertion is that a particular program actually helps the poor as a class, even though it is quite clear that some individual poor people will be made worse off.<sup>171</sup>

The answer to this important question might well be different in different contexts, but—in any event—this inquiry will require an extension of existing environmental justice thought. The question provides an opportunity to unpack more carefully what vulnerability means—and what it ought to mean. One thing is clear: just environmentalists should resist the facile answer that the good of the vulnerable community as a whole always or often justifies imposing disproportionate burdens on some truly vulnerable individuals. This approach short circuits a fuller justice analysis and results in missed opportunities to simultaneously alleviate burdens on vulnerable individuals and better achieve environmental goals.

For example, in the case of net metering, many have argued that any burden that net metering imposes on vulnerable consumers who face rate increases is outweighed by the benefits to vulnerable people who currently live near dirty power plants that can eventually be shuttered if society shifts to the renewable power that net metering promotes. Thus, they argue that current net metering programs should be retained without adjustment for potential burdens on the poor. In California, however, more creative solutions have emerged to allow the poor to participate more fully in the benefits of solar power—including virtual net metering for multi-family units, community solar programs, and subsidies for lower income families to purchase rooftop solar panels.<sup>172</sup> By allowing more low-income individuals to access the benefits of rooftop solar, these solutions promote both justice and increased environmental protection. It is probably not a coincidence that California's Public Utilities Commission has largely rejected the utility industry arguments for rolling back net metering on

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competing interests so much as deprive one side of the benefits that environmental protection creates.

171. *See, e.g., Wenz, supra* note 120, at 64, 76.

172. *See, e.g., Churchill, supra* note 143.

fairness grounds that so many other state commissions have found persuasive.<sup>173</sup>

### B. *What Harms Count?*

As we begin to grapple with just environmentalism, we must consider not only whose harms ought to count but also what sorts of harms count. The most obvious harm arising from environmental protection comes in a hit to livelihoods and pocketbooks. While the political import of harms to livelihoods is great, in many conflicts under existing environmental laws, those costs exert little overt influence on outcomes. For example, in *Whitman v. American Trucking Ass'ns, Inc.*, the Court noted that the industry groups had argued against enhanced air quality standards because "the economic cost of implementing a very stringent standard might produce health losses sufficient to offset the health gains achieved in cleaning the air—for example, by closing down whole industries and thereby impoverishing the workers and consumers dependent upon those industries."<sup>174</sup> Just as quickly as the Court recognized the impact, the Court dismissed it: "That is unquestionably true, and Congress was unquestionably aware of it."<sup>175</sup> While the finding that, given the text of the statute, economic costs of environmental protection fall outside of the purview of administration of the law is not unusual, the political heft of this sort of argument about economic harm remains substantial. Arguments like this one are bound to be found almost everywhere that environmental protection is challenged.

Economic losses, of course, are not limited simply to the loss of a paycheck. For many communities, particularly rural communities, local environments do a great deal to provide and supplement livelihoods. For example, people may work as farmers, loggers, fishers, guides, hunters, grazers, and miners. Even when a person's main work is not tied up directly with the environment, people may use the environment to satisfy or supplement a wide range of needs from diet to fuel to medicine. Very frequently, the poorer a person is, the more she will rely on the

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173. See Herman K. Trabish, *Inside the Decision: California Regulators Preserve Retail Rate Net Metering Until 2019*, UTILITY DIVE (Feb. 1, 2016), <http://www.utilitydive.com/news/inside-the-decision-california-regulators-preserve-retail-rate-net-meterin/413019/> [<http://perma.cc/R37Y-5HV5>].

174. 531 U.S. 457, 466 (2001).

175. *Id.*



environment for her livelihood, and the local environment is often regarded as a form of community safety net.<sup>176</sup>

Harms can, of course, be much more diverse than harms to economic well-being. Economic harms to communities of resource users can fragment, displace, assimilate, or drive communities toward cultural disintegration. For example, when indigenous peoples speak of harms resulting from environmental protection policies, these harms typically relate to interference with the tribe's relationship with the land and its resources, or to the right of self-determination and autonomy in managing the tribe's resources. When the government places restrictions on hunting animals and gathering plants integral to tribal lifeways, this results not only in loss of food security but also in loss of culture.<sup>177</sup> These environmental protection measures have threatened local traditional knowledge about when and where to access medicinal plants and herbs.<sup>178</sup> These limitations can also interfere with religious or spiritual practices,<sup>179</sup> as can limitations on access to particular land, which can impede access to sacred sites and decimate identity.<sup>180</sup>

Moreover, communities and cultures frequently organize around common livelihoods. For example, almost every sort of resource extraction has an associated community: mining communities, grazing communities,

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176. Arild Angelsen et al., *Environmental Income and Rural Livelihoods: A Global-Comparative Analysis*, 64 *WORLD DEV.* S12, S13 (2014).

177. See, e.g., Tsosie, *Environmental Justice*, *supra* note 12, at 1625, 1645.

178. See Krakoff, *supra* note 12, at 214-17.

179. See, e.g., Adam Weymouth, *When Global Warming Kills Your God: Twenty-three Alaskan Tribesmen Broke the Law When They Overfished King Salmon, but They Claim Their Faith Gave Them No Other Choice*, *ATLANTIC* (June 3, 2014), <http://www.theatlantic.com/national/archive/2014/06/when-global-warming-kills-your-god/372015> [http://perma.cc/W9L7-7LAL] (documenting how Yup'ik tribal members violated limits on King Salmon fishing in Alaska—limits enacted because of dwindling King Salmon population likely caused by climate change—because they believed they were bound “to continue their ancestral traditions” and that “[i]f Yup'ik people do not fish for King Salmon, the King Salmon spirit will be offended and it will not return to the river”).

180. Eric Dannenmaier, *Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine*, 86 *WASH. U. L. REV.* 53, 60 (2008) (“Indigenous peoples’ own claims about their relationship to the land make reference to spiritual and cultural concerns as well as economic (or livelihood) concerns.”).

farming communities, and fishing communities are some familiar examples. When environmental protection measures threaten the viability of these extraction industries, local communities assert not only economic harms but also harms to their way of life—to the traditions and culture they value in their own lives and that they hope to pass on to their children.

What should we make of losses related to a person's way of life? If just environmentalism is to consider harms to ways of life, cultures, and religious practices, it will have to grapple with difficult questions about which ways of life, cultures, and religious practices count—which ones deserve weight and protection—and how, assuming that environmental protection is worth pursuing given these costs, to address such profound, if sometimes intangible, losses. It may also have to confront questions about respect for indigenous self-determination when the priorities of indigenous peoples regarding management of their resources do not align with environmentalists' preferences. These questions are rarely confronted in the traditional environmental literature because most of the harms related to siting and other quintessential environmental justice issues are harms to interests like health and property values, which are more easily measured and do not usually require difficult line-drawing. Claims of damage to culture or deference to indigenous autonomy, for example, are less common in that context.

Thus, just environmentalism will require us to address a relatively new set of questions about whose culture should be taken into account and why. Some scholars have suggested the difficulty of "judg[ing] among competing cultural practices" if the criterion is not simply the environmental effects of those practices.<sup>181</sup> Grounding environmental policy in cultural judgments made on any basis other than environmental impact will, they claim, open the door to all kinds of claims that particular cultural practices should be protected even when they do substantial environmental harm:

For example, backpacking, off-road four-wheeling, recreational vehicle "camping," and fishing are all cultural practices, but they have different environmental consequences and should be judged in light of those consequences, not their importance to the groups that practice them.<sup>182</sup>

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181. Deluca, *supra* note 151, at 34.

182. *Id.*

Judging what kind of cultural claims—and, relatedly, what “ways of life”—should get weight in a just environmentalism framework will be a daunting but not impossible task. We might, for example, consider how central the impacted practice is to the well-being and identity of individuals or the relevant community. Indeed, we might consider whether it is an individual or a coherent community asking for recognition of cultural and “way of life” claims, as one might question what “culture” or “way of life” means—or whether it has any meaning at all—in the context of an individual instead of a wider community. We might also consider how longstanding the cultural practices are and how intimately they are connected to particular land or natural resources.

While it will often be extremely challenging to assess these claims, there may be ways to craft approaches to just environmentalism solutions that allow those asserting harms to way of life or culture to value their own claims, rather than requiring a third-party decisionmaker to assess either the legitimacy or value of those claims. For example, if overfishing in a particular area risks fishery collapse, a regulator could allocate whatever limited fishing permits it still plans to issue to the most vulnerable fishers—for example, subsistence fishers or indigenous fishers for whom fishing is part of their way of life—and make these permits transferable. The individual fishers could then choose whether to keep those permits and preserve their way of life or whether to sell them on the open market.<sup>183</sup> Stakeholders in any particular dispute might also generate other procedures that allow individuals to value their own culture or way of life claims.

Another question that just environmentalism requires us to clearly confront is whether justice concerns are triggered only by harms that can be traced to discriminatory intent or animus. In the context of traditional environmental justice, choices about the distribution of environmental harms are often made by decisionmakers, whom we suspect (willingly or not) harbor some degree of prejudice, and that this prejudice (perhaps subtly, perhaps overtly) taints the decision-making process. In contrast, for some potential just environmentalism claims—particularly those that arise out of natural resource conservation—this kind of discriminatory intent is less likely to be present. This is true both because it is often unclear in the conservation context which human populations will be

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183. We recognize that this is not a perfect solution because the subsistence fisher might lack adequate information to appropriately value the fishing permit.

affected when the conservation decision is made and because, when the affected parties can be identified in advance, it is often because the decisionmaker is acting to protect a unique resource that cannot be "sited" elsewhere. That is, the decisionmaker cannot choose which community to burden—that consequence follows inevitably from the conservation decision itself.

For example, assume the conservationists want to protect an endangered species. It may well be the case that where that species is found is only generally known at the outset, and it only becomes clear where the species is located (and, indeed, only worth spending the resources to make that determination) after the decisionmaker decides that conserving that species is a priority. Within the context of U.S. environmental law, for example, the government first determines that a species warrants listing, and only after that decision is made does the government turn to identifying that species' habitat. Thus, those who will bear the burdens of species protection are usually not identifiable in advance. Justice Scalia noted just this problem when he lamented that the way the Endangered Species Act distributes the cost of protecting species is both somewhat random and insensitive to imposing ruinous burdens on the poor.<sup>184</sup>

Even in those conservation cases in which it is clear from the outset what population will be affected—for example, when a new national park or monument designation is being considered—the resource to be conserved is often unique and its location is fixed. Just as with endangered species, we have to protect the resources where we find them. Thus, the decisionmaker may have only one choice—or at least a much more constrained set of choices—about where to locate the park.<sup>185</sup> In contrast, for the typical siting decisions about where to put a locally undesirable land use that are the bread and butter of traditional environmental justice, the decisionmaker often has myriad siting choices, perhaps including siting the facility in a different state or even a different country. Does the fact that we do not really "site" endangered species, riparian zones, mountain ranges, or amazing natural features (such as the arches of

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184. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting).

185. Of course, even when a park's location is basically fixed, there will still be numerous decisions to be made about everything from the size of the park and its precise boundaries, to access and management rights for local communities or tribes.

Arches National Park or the peaks of Yosemite) mean that environmental justice is less relevant to these contexts and their associated harms?

Both of these differences—the inability, in some cases, to identify upfront who will be harmed and the fact that only particular sitings are possible—suggest that in the just environmentalism context, particularly for conservation-related harms, there is perhaps less reason to think that either racial discrimination or an intent to target poor neighborhoods influences the distribution of those harms. That said, the shifting priorities of different eras may mean that where Native Americans were once driven to the least arable lands, their remaining lands may be now be more broadly valued by society as scenic, unspoiled, or culturally significant. Lands that have gone undeveloped because of the sustainable practices or lack of access to capital of their custodians may mean that those lands have preserved species or features that become targets of protection. Such cases may implicate race and culture and impose disproportionate costs on the vulnerable.

Should these kinds of harms then “count” for environmental justice purposes or not? While one might make a case for excluding (or at least worrying less about) these harms that are less likely to have resulted from racial or other discriminatory animus on the part of decisionmakers, we believe there are strong arguments favoring consideration of such harms.

Most theories of distributive justice that inform environmental justice care about the actual distribution of relevant costs and benefits, not merely the intent of the decisionmaker who allocates those harms and benefits. Disproportionate impact on vulnerable groups can itself be an injustice. While the environmental justice movement traces its roots, in part, to the civil rights movement,<sup>186</sup> and a concern with cases of “environmental racism,” or “racial discrimination in the environmental decision-making process,”<sup>187</sup> the environmental justice movement has, over time, expanded its focus beyond discriminatory intent to consider disparate impacts, as well.

This shift mirrors the evolution of the broader civil rights movement toward an emphasis on the role of structural racism in creating discriminatory impacts or effects that contribute to the continued poverty,

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186. Allen et al., *supra* note 166, at 108.

187. *Id.* at 109 (tracing the idea of “environmental racism” to one of the commonly accepted “origin stories” of environmental justice—the Warren County protests against siting PCB disposal in predominantly poor and African-American neighborhoods).

health risks, and obstacles to social mobility faced by the vulnerable and communities of color.<sup>188</sup> The civil rights movement in particular has tried to expose the role that built-in structural forces play in stacking the deck against the poor and communities of color and in fostering the underlying vulnerability that exacerbates the burdens experienced by environmental justice communities. Once we acknowledge that past injustices play a major role in current vulnerability, the need to demonstrate discriminatory intent in particular cases wanes and the opportunity to redress discriminatory impacts opens.

Additionally, sometimes the kinds of disproportionate impacts on vulnerable people will be relatively easy to predict—even if it's not clear exactly which people will be impacted—so measures to remedy those likely injustices can reasonably be developed at the outset. For example, since at least the 1930s, the parties subject to treaties on international whaling law have included particular exemptions for certain indigenous cultures, though the scope of the specific whales included and the breadth of the exemption have ebbed and flowed over time.<sup>189</sup> Interestingly, the exemptions over time have recognized not only the subsistence needs of indigenous cultures for whales but also the cultural and spiritual significance of whaling.<sup>190</sup> We find a similar allowance for subsistence hunting and gathering for native Alaskans in the Endangered Species Act.<sup>191</sup>

### C. *What Might Justice Look Like in Just Environmentalism?*

One question that has received significant attention in environmental justice literature is: what does environmental justice mean? As mentioned in Section IV.A, the environmental justice literature generally conceives of environmental justice in both procedural and substantive (or distributive) terms. Both of these aspects of justice are likewise central to just environmentalism and will be explored in this Section.

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188. This shift has occurred even as the Supreme Court has limited constitutional equal protection claims to those that can prove discriminatory intent. *See, e.g.,* *Washington v. Davis*, 426 U.S. 229 (1976).

189. Anne M. Creason, *Culture Clash: The Influence of Indigenous Cultures on the International Whaling Regime*, 35 CAL. W. INT'L L.J. 83, 84-86 (2004).

190. DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 1066 (4th ed. 2011).

191. 16 U.S.C. § 1539(e) (2012).

## 1. Procedural Justice

Most conceptions of procedural justice focus on giving affected parties some kind of voice in the decision-making process that affects their interests. When those who will experience the harm cannot be readily identified at the outset, opportunities for participatory justice may be much more limited because we cannot easily ascertain who should be given information, input, and influence in the initial decision-making process. In these situations, procedural justice may be possible only at a remedial stage, after harms become clear. While participation in the crafting of remedies, including potential compensation or mitigation measures, is better than no participation at all, it may be less desirable because, once a program is already in place or well underway, there may be less flexibility or political will to develop and implement remedies.

In many just environmentalism contexts, however, affected parties can be effectively identified at the outset of the process. In these situations, approaches to participatory justice might be viewed along a spectrum, ranging from giving affected parties information about how their interests may be affected, to giving those parties some opportunity to be heard in the process, to formally recognizing parties as stakeholders and giving them a seat at the negotiating table, to granting them decisional autonomy (akin to veto power) over the ultimate decision.

In practice, questions about the extent of participation that just environmentalism requires will often look similar to those that arise in traditional environmental justice contexts. These questions are generally well explored in the literature,<sup>192</sup> so we will not spend much time on them here. One facet of procedural justice that deserves fuller exploration, however, is the question of when and under what circumstances it might be appropriate to grant groups decisional autonomy.

Consider, for example, a scenario in which the federal government wished to protect the magnificent Havasupai Falls, located on the Havasupai Tribe's reservation, by annexing it into nearby Grand Canyon National Park. Would participatory justice require that the Tribe have decisional autonomy over this decision—the absolute right to veto the federal government's proposal? There are at least two strong reasons that

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192. See Eileen Guana, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3 (1998) (providing a broad overview of administrative law theory and how this theory harmonizes and conflicts with various forms of participation that might be used to pursue environmental justice).

suggest that it would: first, the tribes have sovereignty over their own lands and resources that must be respected; and second, the importance of the land to tribal culture and lifeways would be so difficult to value, and its loss so incalculable, that the sounder approach would be to put tribes in control of that valuation by affirming their property right in their land.

As this analysis suggests, we might frame the choice of whether to grant a party decisional autonomy as a choice between liability rules (where an outside entity assesses values) and property rules (where the harmed entity itself decides whether or not to enter into a transaction).<sup>193</sup> So understood, one major question in implementing just environmentalism is when it makes sense to use a property rule instead of a liability rule. A number of factors potentially inform this choice, including what parties are impacted, the relationship between the parties, and whether a party's sovereignty is implicated. Such determinations may also turn on the nature of the harm suffered, the degree of suffering, and whether such harms are quantifiable or easily measured.

One reason for employing property rules is that we think third-parties (such as courts or other institutions) lack the capacity to effectively value a right or interest.<sup>194</sup> When an affected party is given decisional autonomy, the harm does not occur unless whatever compensation and other reparations are offered are enough to entice the harmed party's consent. When one employs this kind of property rule, we would expect that the price of consent is a fair price unless there is reason to believe that consent was coerced, corrupted, or obtained by fraudulent methods.

The difficulty of court or other third-party valuation of tribal interests in their land is illustrated by the historic dispute between the United States and the Great Sioux Nation—Lakota, Nakota, and Dakota peoples—over the Black Hills. While conflicts between the federal government and the Great Sioux Nation are of long standing, this dispute regarding ownership of the Black Hills stems from the 1868 Treaty of Fort Laramie.<sup>195</sup> The Black

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193. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) ("An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.... Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule.").

194. See, e.g., *id.* at 1125-27.

195. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980).



Hills are deeply sacred to the Sioux Nations and include the site of the tribes' creation.<sup>196</sup> While the 1851 Treaty of Fort Laramie required that three-fourths of male tribal members agree to any subsequent changes to reservation boundaries, which included the seven million acres of the Black Hills, the federal government seized the Black Hills in the 1868 Treaty of Fort Laramie under dubious circumstances and without satisfying the earlier treaty's conditions for changing reservation boundaries.<sup>197</sup>

In 1980, the Supreme Court heard the longstanding claim brought by the Oglala Sioux, in which the Tribe argued that the Black Hills had been stolen from them in violation of the agreements between the Tribe and the United States, as implemented by the Act of February 28, 1877.<sup>198</sup> The Court agreed and ordered that they be compensated.<sup>199</sup> About \$100 million was set aside for the Sioux, but they did not want compensation: they wanted the Black Hills.<sup>200</sup> Either the Sioux felt that no price would be enough or, at the very least, they did not want to sell their interest in the Black Hills at that price. By most accounts, the Sioux believed that the Black Hills were "not for sale."<sup>201</sup>

Today, the Pine Ridge Reservation, home to the Oglala Lakota and adjacent to the Black Hills, is plagued by a staggering 49.7% rate of poverty according to the Census Bureau's American Community Survey 5-year estimate.<sup>202</sup> In the meantime, the trust account for the compensation

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196. See Kirsten Matoy Carlson, *Priceless Property*, 29 GA. ST. U. L. REV. 685, 701-02 (2013).

197. *Id.* at 698-99.

198. *Sioux Nation*, 448 U.S. at 374-84.

199. *Id.*

200. See Carlson, *supra* note 196, at 688-89.

201. See, e.g., Tom Cook, *If They're Not for Sale, What Are the Black Hills For?*, INDIAN COUNTRY TODAY (Sept. 4, 2016), <http://newsmaven.io/indiancountrytoday/archive/if-they-re-not-for-sale-what-are-the-black-hills-for-gU4P7slBIESviPIGpE8lQA> [<http://perma.cc/9KS3-HMZ9>].

202. U.S. CENSUS BUREAU, PINE RIDGE CDP, <http://www.census.gov/search-results.html?page=1&stateGeo=none&searchtype=web&cssp=SERP&q=poverty+pine+ridge+SD&search.x=0&search.y=0&search=submit> [<http://perma.cc/WV25-5DJD>].

award has grown to around \$1.3 billion.<sup>203</sup> The Sioux still refuse to accept the compensation. The award provided by the Court represents a liability award—fair-market value regardless of whether or not the harmed party wants to sell. The heart of the Sioux's claim, however, was that they have a property right in the Black Hills that they cannot be forced to surrender, even if they are compensated for the loss. The fact that the Sioux still have not collected the award illustrates not only the holdout issue that property rules can create but also the potential wisdom of employing property rules when third-parties are incapable of correctly valuing the harm—perhaps because, to the property holder, that value is incalculable.<sup>204</sup>

That is not to suggest, however, that everyone who asserts a difficult-to-value interest in an existing way of life should be given decisional autonomy over proposed environmental protection measures. Context clearly matters. Generally, property rights are far from absolute: they do not guarantee the right to say no when the government comes knocking and wishes to regulate or purchase your underlying right. However, when the harmed party is, or is at least represented by, a different sovereign (e.g., another country or a recognized tribe) than the party causing the harm, we will often find that the harmed party can make a strong argument for at least a degree of decisional autonomy.

In many respects Tribes are the easiest hard case—in part because they are co-sovereigns, even if they are not full sovereigns. Nevertheless, they do provide a bookend from which we can potentially reason about how much participation procedural justice requires in other contexts.<sup>205</sup>

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203. *Why the Sioux Are Refusing \$1.3 Billion*, PBS NEWSHOUR (Aug. 24, 2011, 3:57 PM) [http://www.pbs.org/newshour/arts/north\\_america-july-dec11-black\\_hills\\_08-23](http://www.pbs.org/newshour/arts/north_america-july-dec11-black_hills_08-23) [<http://perma.cc/C3F6-4MN8>].

204. In most instances, holdout claims vis-à-vis the government can be solved by eminent domain. How that works in the context of treaty obligations is much less clear.

205. Some might argue that even in the tribal context, decisional autonomy should not always be honored. In Subsection III.B, we discussed how members of the Skull Valley Goshute fought to site nuclear waste disposal on the tribe's reservation and how Congress thwarted that proposal by creating a wilderness area around the reservation, thus making it impossible to build the transportation infrastructure to haul in the nuclear waste. This is a situation that could be framed as a classic example of both traditional environmental justice and the sort of just environmentalism we discuss in this Article. On the one hand, it could be argued that even though the Skull Valley Goshutes had consented to site a nuclear waste facility on their

## 2. Distributive Justice

Of course, justice in the context of just environmentalism does not refer solely to procedural justice. Concerns of substantive justice—particularly distributive justice—also arise. Like issues of procedural justice, distributive justice questions can arise at the initial decision-making phase if it is clear that the likely distribution of harms will unduly burden the vulnerable or can arise later as a policy is implemented and its effects become clearer. Whenever it appears that the vulnerable will bear a disproportionate share of the costs of the environmental protection, distributive justice might call for attempts to alleviate those burdens by mitigating the harm caused or, perhaps, trying to provide some sort of compensation or reparations for the harm suffered.

Of course, this formulation requires us to decide at the outset what it means for a vulnerable group to bear a disproportionate share of the harms of environmental protection. That is, we must decide exactly when distributive justice concerns are triggered. Thus far, we have spoken primarily of “disproportionate” burdens on the poor, but one could potentially make the case that any burden on the poor is disproportionate because they start from a disadvantaged position. Disproportionate in

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reservation, given the Tribe's vulnerability and lack of other development options, it would be an injustice to let the siting go forward because it is a history of unrelenting injustice that put the Skull Valley Goshutes in a position where they would make such a choice. That is, prior injustices have so constrained the Tribe's choices that the Tribe's consent cannot be treated as effective and valid, or at least final. *See* Endres, *supra* note 91, at 929-30. Furthermore, the siting decision must be viewed in the “broader system of environmental injustices against Native Americans, particularly nuclear colonialism”—including “decades of toxic exposure from Department of Defense experiments with toxic and biological warfare” that have devastated the reservation economically and environmentally and left the tribe with few viable avenues for economic development. *Id.* On the other hand, we could look at the thwarting of the Tribe's autonomy as a paternalistic imposition of forced environmentalism that perpetrated a new injustice against the Skull Valley Goshutes by preventing them from pursuing economic development opportunities in a way the Tribe saw fit. Indeed, putting aside whether they would agree with our arguments in this Article, some scholars would likely argue that the consent of the Tribe's sovereign government obviates any potential environmental justice issue. *See, e.g.,* Krakoff, *supra* note 29, at 163 (“Environmental justice for tribes must be consistent with the promotion of tribal self-governance.”).

other situations might mean something more like “regressive,” in either the absolute sense (that the absolute burden borne by poor individuals exceeds the absolute burden borne by more affluent individuals) or in a more relative sense (that, for example, as a percentage of income, the burden will consume a higher percentage of the poor’s more limited budget).<sup>206</sup>

As Part IV suggests, we might also evaluate disproportionality in terms of the disconnect between the burdens of environmental protection that the vulnerable are asked to bear and their contribution to the underlying environmental problem.<sup>207</sup> In most cases, this disproportionality will be

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206. One might also view burdens on the poor as regressive even if they are equivalent in either absolute or percentage terms to those borne by the rich because the declining marginal utility of money means that those dollars are more valuable to the poor.

207. Alternatively, in some situations, one might also evaluate whether an environmental protection harm falls disproportionality on the vulnerable by considering whether there is a mismatch between that burden and the extent to which that vulnerable group will benefit from the environmental protection measure. There are some situations, for example, in which the same vulnerable people are both harmed more and benefitted more than others. For example, in the pollution control context, if a state regulator blocks the siting of a factory in a vulnerable neighborhood because that factory would have greatly exacerbated the neighborhood’s air pollution burden, neighborhood residents are most hurt by that decision—because they lose potential employment opportunities—and most benefitted by that decision because they avoid breathing dirtier air. The same kinds of questions also arise in the conservation context, although the time-scale for incurring the costs and garnering the benefits may be quite different. For example, a temporary hunting ban on a threatened species or fishing restrictions in a local fishery in danger of collapse because of overfishing will likely harm the local subsistence hunters and fishers most but, at least in the long term, may benefit those same locals most once the populations have been sufficiently restored to allow for subsistence use.

How ought we to treat these situations? Do we offset the harms and benefits—concluding that if the same vulnerable people are both harmed in greater measure and benefitted in greater measure then there is no disproportionate burden and therefore that no remedy, whether compensation or mitigation of harms, is required? Is the answer the same in the conservation example in which the harms are relatively certain and the benefits are both delayed and more speculative because restoration efforts may not succeed and because the subsistence fisher may not be able to ride out the temporary restrictions and will be forced to relocate and establish a

readily apparent, as vulnerable groups usually have smaller environmental footprints than more affluent communities.<sup>208</sup>

In a few situations, however, it might be the case that the vulnerable people who are most harmed by a particular environmental protection measure also contributed disproportionately to the environmental degradation that the measure is designed to remedy. For example, a particular species might be driven to near extinction by subsistence hunters who have few, if any, other viable sources of food. The poor may engage in slash-and-burn agriculture that decimates forests because they do not have access to artificial fertilizers that might enable them to use their existing fields productively year after year. In these situations, does justice not require any consideration of their harms when governments ban hunting the endangered species or ban slash-and-burn practices? Or, in an example more likely to occur domestically, would just environmentalism require anything if a carbon tax falls hardest on low-income individuals who drive older, less efficient cars? It is true both that the poor are more likely to drive such cars because of financial constraints and that, by driving those cars, the poor may produce more transportation-related greenhouse gas emissions, at least if we focus on car travel alone.

The answer to the question of what justice requires in these circumstances may turn, in part, on whether causation is equated with culpability. We might judge contributions to a problem differently if they

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new life and livelihood elsewhere without real hope of return, even if restoration eventually succeeds?

If we do choose to offset costs and benefits (or treat being particularly burdened and particularly benefited essentially as canceling each other out), we would then have to think more carefully about what we mean by more benefited or more harmed. In the takings context, courts have sometimes distinguished between “general benefits” and “private benefits” when deciding whether an exercise of eminent domain creates a particular, private benefit to the landowner that should be offset against (e.g., deducted from) the amount the government owes her in just compensation. *See, e.g., Borough of Harvey Cedars v. Karan*, 70 A.3d 524 (N.J. 2013) (holding that a local government’s taking of a strip of the landowner’s beachfront property to construct dunes to prevent flooding provided a private flood control benefit for the homeowner, not merely a generalized societal benefit, and thus that benefit could be valued and deducted from the compensation owed). That kind of analysis may have some applicability here.

208. *See* sources cited *supra* notes 129-130.

are driven by greed than if they are driven by desperate poverty and the pressing need to keep families fed, clothed, and able to get to work. If the vulnerable make choices that are more damaging to the environment precisely because they are vulnerable, we might recognize that those choices cause more harm, but that those choices are also severely constrained by the practical realities of living at the margins and are therefore, perhaps, less culpable.

This reduced culpability might seem particularly relevant to the justice analysis if we recognize that vulnerability is often driven more by structural forces that impose disparate burdens on the poor and racial minorities than by individual decisions and actions. Indeed, one of the reasons that distributive justice suggests that we should not impose higher costs of environmental protection on the poor is that they are already disadvantaged and that disadvantage usually stems at least as much from societal forces as from individual choice. In some ways then, we have circled back to the question of whether any burden on the poor is disproportionate. While these questions will undoubtedly require more exploration and theorizing, we would suggest that contributions to environmental problems driven by poverty and vulnerability shaped by larger structural forces should be discounted (or perhaps ignored entirely) when assessing whether the burdens environmental protection inflicts on the poor are disproportionate.

Just as it may sometimes be difficult to sort out whether we can fairly view the vulnerable as responsible for the harm that the environmental protection addresses, we will also have to determine whether the harms that allegedly flow from the environmental protection are fairly attributable to the environmental protection itself. For example, if struggling coal miners allege that they will (or have) lost their jobs because of new clean air regulations, we will have to determine if that job loss is actually “caused” by the new environmental regulations or whether the job loss is attributable instead to other facts, such as the falling price of natural gas (a competitor fuel). In a similar vein, some scholars have argued that the loss of Pacific Northwest logging jobs that is often blamed on regulations designed to “protect the northern spotted owl” was, in fact, “due mostly to the movement of wood mills from the United States to Japan.”<sup>209</sup>

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209. Wenz, *supra* note 120, at 76 (“Restrictions on logging to protect the northern spotted owl were inappropriately blamed by logging interests looking for a scapegoat”).

A variation on this problem that is perhaps even more complex—theoretically if not factually—is how to treat objections to just environmentalism compensation claims that allege that no compensation is due because the asserted harms were inevitable. For example, one might claim that consumer demand for cleaner energy would eventually have put coal miners out of business in any event or that the rate of logging was unsustainable and loggers would likewise have inevitably lost their jobs. Does the inevitability of a harm due to other factors obviate any justice claim for mitigation or compensation? The inevitability objection might be evaluated by considering factors such as how far out the “inevitable” job loss was, how much the environmental regulations accelerated that loss, and whether any compensation should thus be limited to harms necessitated by the earlier transition to another job. Many questions remain, of course. Are cultural harms that were “inevitable” still compensable, if part of what makes those harms so serious is the likely permanence of those cultural losses? Or do we value the time that a community might have enjoyed its culture that has now been cut short? How can we predict whether the job transition would be cheaper and easier now than in a few years? More broadly, there are good reasons to be cautious about claims that loss of culture or a way of life is inevitable. Much of U.S. national park policy, for example, was grounded in the very troubling notion that indigenous people and cultures were inevitably going to disappear and that “hastening this inevitable” transition was not a cause for concern.<sup>210</sup>

Just environmentalism may also push us to consider a wider range of potential remedies than environmental law has typically contemplated. If environmental law begins to consider and account for just environmentalism concerns, trying to address them will both complicate and expand the reach of environmental law. For example, in 1990, Senator Robert Byrd urged Congress to authorize \$500 million in financial and job retraining assistance to West Virginia coal miners who would lose their jobs as a result of the Clean Air Act Amendments then before Congress.<sup>211</sup> Senator Byrd’s amendment to the bill ultimately failed,<sup>212</sup> but one might color his proposal as a bill seeking not just job retention or even

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210. Krakoff, *supra* note 12, at 237-38.

211. See Philip Shabecoff, *Senate Rejects Plan on Aid to Miners*, N.Y. TIMES (Mar. 30, 1990), <http://www.nytimes.com/1990/03/30/us/senate-rejects-plan-on-aid-to-miners.html> [<http://perma.cc/5RDM-PA2H>].

212. See *id.*

congressional pork for his constituents, but rather reparations in service of a more just environmentalism.

Indeed, depending on which harms we decide count for just environmentalism, just environmentalism may cause this same bleed of environmental law into policy areas usually thought to be far afield from environmental issues in a wide variety of contexts and circumstances. Consider, for example, the extreme case of an indigenous population that is displaced by environmental protection policies, as has happened in the establishment of so many national parks both in the United States and internationally. The harms of removal may include harm to traditional livelihoods, homelands, diet, culture, sacred sites, traditional burial grounds, and so on. In the context of removal of indigenous peoples from traditional homelands threatened by climate change, Professor Rebecca Tsosie characterizes the threat as “genocidal” and argues that compensation measures will fail to address the seriousness of the harms.<sup>213</sup> Still, the effort to address these harms might seek to maximize the prerogatives and self-determination of indigenous communities and could include coordinating efforts to provide jobs or job training or compensation focused on education, recreation, health care, food security, housing, and on and on.

Once we open up the possibility of trying to compensate those suffering from environmental protection, we open up the possibility that environmental law and policy will have to engage more fully with a wider range of human concerns. Such an expansion returns to the roots of environmental justice, which merged environmental concerns with broader concerns about civil rights, education, housing, employment, and health.<sup>214</sup>

### 3. Examples of Application

In Part III, we laid out three broad categories of just environmentalism challenges—those related to conservation, pollution, and environmental taxes. In this Subpart, we provide an illustration of how just environmentalism would cause us to rethink some of the examples introduced above. For each of the examples we take up, we ask the questions that our just environmentalism framework suggests we ought: what are the relevant communities of special concern; what constitutes

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213. See Tsosie, *Environmental Justice*, *supra* note 12, at 1625.

214. See, e.g., Roberts, *supra* note 42, at 288.



harm in each particular context; and, what would justice require in each circumstance? As this discussion demonstrates, addressing these questions does not provide easy answers, but it helps frame the issues for decisionmakers so as to enhance the likelihood of a more just result. In the Subsections that follow, we apply the just environmentalism framework to three illustrative scenarios: the founding of Yellowstone National Park, dealing with risks exposed and posed by the BP Spill, and the designing of a carbon tax for Washington State.

a. Reimagining Yellowstone National Park

As mentioned in Part III, the creation of many protected areas and the decision to protect particular species precipitates the displacement of human livelihoods, homes, and a wide range of other interests. Because it is frequently the case that the poor rely heavily on the natural resources around them, the decision to protect landscapes and species will exact a great deal from those already most vulnerable.

Taking one of the protected areas examples explored in Part III, we briefly consider how just environmentalism might have made a difference in the decisions relating to Yellowstone National Park. In order to establish the Park, the U.S. government banished and eradicated Native Americans from the Park.

A first order question the U.S. government would have had to address if it had embraced just environmentalism was whether a community of concern was implicated in the decision to create Yellowstone. The answer to this question is straightforward—the Tribes who at the time lived in and looked to Yellowstone to sustain their way of life are, indeed, a potential community of concern. At that time, what became Yellowstone was not occupied by non-indigenous people, although a very small number of entrepreneurs had tried to establish businesses in the area based on their belief in the healing potential of Yellowstone's hot springs.<sup>215</sup> The number of entrepreneurs, however, was small and may have even post-dated the creation of the park.

We next ask, what constitutes harm in this context? In this context, establishing harm is not difficult; instead, what is difficult is determining where to stop counting harm. There is little ambiguity about what happened and how it negatively impacted the tribes. The tribes were

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215. Brigham Daniels, *Emerging Commons and Tragic Institutions*, 37 ENVTL. L. 515, 552-54 (1997).

evicted from the park. How should this harm be identified, quantified, or calculated? Loss of land? Interference with tribal autonomy? Loss of shelter and vital subsistence and medicinal resources? Disruption of migration patterns? Loss of hunting? Loss of access to sacred sites and place-based rituals? Interference with livelihoods? Loss of enjoyment of the beauty of nature that the United States had determined it would instead protect and promote for its own citizens? While the answers to these questions are far from clear, just environmentalism nonetheless demands that decisionmakers grapple with these very questions.

We next ask, what would justice look like in this context? We first note that we could avoid all harm and issues of proper mitigation if the conflicts with indigenous people could have been avoided. Arguably, they could have been, at least to a large extent, particularly in Yellowstone's early days. After all, the area designated as Yellowstone had co-existed for millennia with sustainable Native American use. Still, it is likely that some conflicts could not have been completely avoided given that the park's new mission was not only to preserve Yellowstone but also to provide access to visitors. Certainly, as time progressed and the number of visitors and uses multiplied, conflicts would have proved unavoidable, and the tribes would have been curtailed in their various uses of the region.

Assuming that conflicts could not be avoided, we move on to think about how different framings of justice might apply in this situation. From a procedural justice perspective, the tribes that had used Yellowstone for generations would be in a strong position to insist on participation, if not some degree of autonomous decision-making, about the future of the park. Thus, where conflicts could not be avoided, the U.S. government would need to enter into talks with the tribes about whether the park would be created at all and about how harms could be mitigated. While this give and take seems difficult, it is similar to problems the park faces in dealing with conflicts with other government agencies and state and local governments, each with their own degree of autonomy over some decisions related to the park.

Even if the tribes were not provided a degree of autonomy, they would nonetheless have to be provided information to help understand the decisions being made, as well as the ability to participate, provide input, and be consulted throughout the decision-making process. Ideally, the government and the tribes would have come to an agreement that, at the very least, would not have left the tribes any worse off because of the creation and operation of the park. Depending on how the tribe valued potential opportunities associated with the park, there is a chance that they could have reached a just and mutually satisfactory situation. If an agreement proved elusive, it might have meant no Yellowstone or less

Yellowstone. More likely, it would have meant a different Yellowstone than the one we have today—but potentially a more just Yellowstone.

Had it wished to respect tribal autonomy or at least provide tribal input and participation, the United States would still have had significant leverage to induce tribal cooperation with park management at the time of the park's creation. In considering this, remember both that the U.S. government was willing to give the railroads that would service Yellowstone every other section of property on public lands (640 acres each) for miles along each side of newly built railroad track in order to induce the railroad to lay more rail and that the U.S. government had set up offices around the country to give land away to potential homesteaders. Thus, even with tribal participation and input, the outcome of no park at all, though possible, seems unlikely.

Even in a difficult negotiation, a different sort of park, one that gave up on the ideal of nature untouched and embraced the idea of some human influence in the park, along with some sort of compensation, seems the most likely outcome.

Whatever the initial decision, an agreement that invited or imagined a degree of tribal co-management may have inured to the great benefit of the United States had they sought it. Conflicts over fire suppression would have been addressed much earlier given the Native American practice at the time of burning in conjunction with hunting. The decimation of the wolf and bear populations would have implicated the interests of the tribes, as would their reintroduction. It is hard to imagine exactly how these and many other issues would have played out, but the just environmentalism exercise of considering some of these interests and reimagining how they might have been addressed goes a long way in not only providing a tangible example of just environmentalism in practice but also in detailing the failures of the status quo.

#### b. Rethinking the BP Spill Response

In Part III, we also mentioned that pollution abatement is a second category of circumstances where just environmentalism may help address the myriad of problems that arise. Any effort to reduce pollution has the potential to impose economic consequences, and often vulnerable populations pay a disproportionate share of those costs. In that Part and in the beginning of this Article, we discussed the common perception in New Orleans after the BP spill that the offshore oil production moratorium put in place by President Obama exacerbated the economic turmoil in the region.

Would a sensitivity to just environmentalism have altered the moratorium on offshore oil production? If so, how? In determining whether we have a just environmentalism problem, we first ask whose harms ought to count and if there is a community of concern. Some aspects of identifying communities of concern are easy, but other aspects are quite challenging. It seems obvious, for example, that just environmentalism would care very little for the economic consequences of the moratorium suffered by the world's largest oil companies—like BP—that are actively producing oil off the Atlantic shore. But what about the employees of those companies? Just environmentalism's focus on vulnerable populations would most likely lead us to consider—at most—harms to a subset of those employed by the same companies. The managers, engineers, technological experts, lawyers, and the large number of other professionals employed by the oil industry do not manifest any particular vulnerability and would not be considered vulnerable populations. That said, the moratorium might push some employed in lower wage jobs over the economic edge. The communities potentially impacted do not stop there, but expanding the circle of communities of concern too broadly quickly poses challenges of administrative and political feasibility. So, we see that line drawing is going to be difficult in this context. For example, in thinking about the economic costs that resulted from the moratorium, should we consider those employed by contractors and subcontractors relied upon by the industry? What about those who rely on business from companies themselves and their workers? Or, what about those who would now compete for prospective work with those without work due to the moratorium? The ripple effects of economic harm are extremely complex and difficult to identify at a granular level.

Once we have identified a meaningful population of concern, we next move on to ask, what harms should just environmentalism care about? The most obvious harms, of course, are those related to income. Should just environmentalism also concern itself with employment benefits, such as health insurance and retirement security? What about food security, particularly given that the BP spill decimated fisheries in the area? In addition to various categories of harm, we might have to confront questions about the temporal nature of any harm suffered. For example, while decisionmakers might consider economic replacement for lost labor opportunities, where might those measures end? What if, for example, people have a hard time finding a job again even after the moratorium is lifted? At what point should a line be drawn that separates the harm arising from the moratorium from other contributors that make it difficult for a worker to get back into the labor force?

Once we have a handle on the relevant populations of concern and harms that ought to be redressed, we next ask what just environmentalism might look like in this context.

Again, finding ways to avoid that harm to the community of concern would greatly simplify the analysis of this question. Could the harm be avoided here? Of course, the most straightforward way to avoid economic harm from the moratorium would have been to refuse to impose the moratorium in the first place. However, given the importance of concerns beyond the economic implications—such as the need to assess and mitigate the environmental risks associated with the spill, the desire to reduce the risk of having to deal with more than a single spill at a time, the imperative of investigating how the BP oil spill happened and whether other wells in the region posed similar risks, and the responsibility to protect resources and workers going forward—it seems very likely that even if the principle of just environmentalism guided the decision, the moratorium or something like it would have been put in place.

Could the moratorium have been put in place without harming the most vulnerable in society? It seems impossible to construct a moratorium that would keep the vulnerable working. And the further downstream in the economy one reaches in identifying communities of concern, the more implausible it seems.

We might then turn to questions of mitigation. If the moratorium is thought to be only necessary in the short term, this might lead us to think about options like income replacement and the possibility of offering some other substitute for employment income lost due to the moratorium. In the case of the BP spill, this might mean, for example, providing displaced workers preferential employment opportunities in the spill clean up.<sup>216</sup> This, of course, does not come without controversy because the spill itself harms so many aspects of the economy (e.g., tourism and fisheries). If the moratorium is thought to be a long-term policy, the government might think about implementing job retraining programs or investing in placing more government employment opportunities in the affected area.

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216. Of course, we recognize that measures designed to compensate those harmed by environmental protection cannot be taken in a vacuum and will affect the incentives and actions of other parties in ways that may ultimately offset the intended social justice benefits. For example, if the government provides displaced workers with replacement income or employment opportunities, BP itself might be less inclined to provide compensation to those workers.

Procedural justice's pull on this situation increases as the scope of problems mitigated increases. For example, if the moratorium is determined to be very short term, one might think of income replacement for a vulnerable population suffering harm without much feedback from that community. If, however, decisionmakers begin to contemplate, for example, retraining workers for other industries, the strength of the claim that justice requires fuller participation for those affected by the program grows enormously.

### c. Developing a Just Carbon Tax

In some respects, the easiest category of environmental protection measures to reimagine within a just environmentalism framework are those environmental taxes, subsidies, and mandates that make important goods and services more expensive for the poor. Identifying the vulnerable people who are economically burdened by a gasoline tax or a more comprehensive carbon tax, for instance, may be relatively straightforward, although we must still decide who is sufficiently burdened and who is sufficiently vulnerable that justice requires some kind of compensation. Because the harm is economic, however, it should be relatively easy to quantify that harm and to craft a compensation mechanism.

What, then, might justice look like in this context? Recent attempts in Washington State to pass an initiative imposing a general carbon tax suggest that procedural justice concerns loom large for affected communities, even—or perhaps especially—when there seems to be a myriad of potential mitigation measures available to satisfy substantive justice. A proposed initiative that would have made Washington the first state in the United States to adopt a carbon tax was defeated, in part because of opposition by social justice groups. The initiative contained substantive measures, including a one-percent state sales tax reduction and funding for the “working families tax rebate,” that together would likely have “more than offset the otherwise regressive pocketbook impact of the carbon tax on the lowest-income quintile.”<sup>217</sup> The social justice groups objected, however, because they wanted more of the money generated by the tax to go to local infrastructure improvements in low-

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217. David Roberts, *The Left vs. a Carbon Tax: The Odd, Agonizing Political Battle Playing out in Washington State*, Vox (Nov. 8, 2016, 11:00 AM), <http://www.vox.com/2016/10/18/13012394/i-732-carbon-tax-washington> [<http://perma.cc/CTW5-2244>].

income communities and communities of color and, more fundamentally, because the environmental groups driving the initiative had failed to engage social justice groups in the drafting of the initiative and, instead, had “present[ed] them with a fait accompli, asking them to sign on to a policy that a roomful of mostly white wonks had determined was in their best interests.”<sup>218</sup>

That a potentially ground-breaking carbon tax, which—in principle—had widespread support, stumbled because of these procedural justice concerns underscores the need to give affected communities and individuals a voice in the processes that develop both environmental protection measures generally and the more specific measures intended to address regressive effects on vulnerable people. Even when substantive justice measures are comparatively easy to craft, neglecting procedural justice—neglecting to give affected parties a voice in crafting those measures—not only omits an important component of the justice calculus but risks alienating those communities and jeopardizes their political support for the underlying environmental protection measures.

#### *D. What Challenges Do Existing Institutions Pose to Just Environmentalism?*

Assuming that just environmentalism requires some sort of action, one issue that will need to be confronted is how this will fit with existing institutions.

Interestingly, international institutions have taken the lead when it comes to just environmentalism. In most instances, international environmental institutions and law have lagged behind their domestic counterparts, at least for developed countries. What makes just environmentalism different? While the answers are far from certain, we propose a few plausible explanations. First, because individual countries are represented in the international realm, differences between countries matter. The differences between the mainly developed countries of the northern hemisphere and the developing countries of the southern hemisphere have resulted in many important discussions about the plight of the poor and about the different capacities and preferences for environmental protection in rich and poor countries. Second, international law really only works with the cooperation of countries exercising their collective sovereignty. When environmentalism has negative impacts on a

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218. *Id.*

country, that country generally can withhold its consent to be governed by international legal conventions. The problem of such holdouts might have accelerated the evolution of just environmentalism at the international level. A third possible explanation is that because international institutions are not as well developed and entrenched as the domestic institutions of many countries, there is more flexibility for international law and institutions to evolve to address emerging concerns.

One realm in which we have seen evolution to protect local and indigenous people from negative consequences of environmental protection is in climate change policy. When mitigating greenhouse gas emissions, it is often cheaper to protect and restore forests that act as greenhouse gas sinks than it is to reduce emission streams. Additionally, many in the international community see protecting the world's rainforests—their resources and biodiversity—as a valuable co-benefit of climate change mitigation. The political pressure to save these forests along with the potential to make headway on climate change more cheaply created significant international momentum to incorporate forest protection and restoration into international climate change efforts.

With implementation of this strategy came political push back from local communities, indigenous people, and interest groups who advocated for the welfare of these groups. As it turned out, the original negotiations at the global level did not contend with the problems people who lived around and in the forests would face if their access to the forest and its resources were curbed. These impacts are varied and frequently severe. Reducing use of forest land for agriculture could heighten local food insecurity by reducing the amount of land used for agriculture. This would not only reduce some individuals' ability to grow food but also reduce the local supply of agricultural products, which typically increases the price of food. Protecting forests may also mean less harvesting of foods available within the forest, which affects local populations and could severely impair the livelihoods and cultures of any hunter-gathering populations. Moreover, once there is an incentive (such as income) associated with leaving a forest alone, we create a strong incentive for states and private owners to assert exclusive ownership over lands that were previously treated as common-pool resources. This has resulted in local and indigenous people being dispossessed of and restricted from lands they previously enjoyed.

To address these concerns, the states working on climate change have agreed on several sets of principles that seek to provide participatory rights along with general guidelines (e.g., projects should not result in food insecurity) and commitments for compensation where harm cannot be avoided. These principles have not worked perfectly in practice but have



accomplished some of what they set out to do.<sup>219</sup> International law also has other norms, mentioned in Section II.B.1, including sustainable development, that demonstrate at least some commitment to make environmentalism more just for the most vulnerable populations.

Within U.S. domestic law, however, we have not seen as much movement. Indeed, in many contexts, existing environmental institutions are specifically prohibited from considering the economic costs of environmental protection at all, much less the distribution of those costs. At the federal level, for example the EPA is barred from considering economic feasibility when, under the Clean Air Act, it sets national ambient air quality standards (NAAQS),<sup>220</sup> when deciding whether it will approve state implementation plans (SIPs),<sup>221</sup> or in setting national emission standards for hazardous air pollutants (NESHAPs).<sup>222</sup> Most Resource Conservation and Recovery Act (RCRA) regulations of the treatment, storage, and disposal of solid hazardous waste likewise prohibit consideration of costs.<sup>223</sup> Similarly, the Fish and Wildlife Service cannot consider costs when it determines whether to list an endangered species.<sup>224</sup> Nor does the Army Corps of Engineers consider the economic

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219. For example, an impressive social science research project that tried to track how the REDD+ process worked on the ground in Madagascar found that those who lived in the most inaccessible places often failed to receive the benefits and protections promised by REDD+. See Mahesh Poudya et al., *Can REDD+ Social Safeguards Reach the 'Right' People? Lessons from Madagascar*, 37 GLOBAL ENVTL. CHANGE 31 (2016). Professor David Takacs has noted that lack of specificity in the standards has made it difficult to monitor compliance in implementation of projects. See David Takacs, *Protecting Your Environment, Exacerbating Injustice: Avoiding "Mandate Havens"*, 24 DUKE ENVTL. L. & POL'Y F. 315, 348 (2014).

220. 42 U.S.C. § 7409(b)(1) (2012) (requiring standards be set based on providing an "adequate margin of safety . . . requisite to protect the public health").

221. 42 U.S.C. § 7410(k)(2)-(4) (2012) (providing a list of factors the EPA shall consider, which omits economic, political, or even technological feasibility).

222. 42 U.S.C. § 7412(f)(2)(A) (2012) (requiring standards be set based on providing "an ample margin of safety to protect the public health").

223. 42 U.S.C. § 6925(c)(3) (2012) (requiring the EPA to "establish such standards . . . necessary to protect human health and the environment").

224. 16 U.S.C. § 1533(b)(1)(A) (2012) (requiring listing to be based solely on "the best scientific and commercial data available").

costs to a landowner, but instead focuses on the characteristics of the resource, when it delineates wetlands.<sup>225</sup>

All of these actions impact the economy and have the potential to impose particular burdens on the poor, but it is currently illegal for implementing agencies to consider these impacts. Indeed, the only available mechanism for considering costs is usually the takings clause, which won't be triggered in most environmental protection situations and, in any event, provides no special protection to the vulnerable.

There are a few notable exceptions in which U.S. law allows regulators to consider burdens on vulnerable populations. One significant example is the Endangered Species Act's allowance for Native Americans to take endangered species primarily for subsistence purposes (and sometimes religious purposes) without legal penalty or consequence. Indeed, Section 10 of the Endangered Species Act provides an explicit exemption for Alaskan natives who take endangered species for subsistence use,<sup>226</sup> and other allowances have been made on a case-by-case basis through a variety of mechanisms including agency flexibility to set regulations when a species is listed as threatened rather than endangered.<sup>227</sup> Other enactments related to the management of fisheries and whaling do much the same. Yet, in the vast majority of instances (again absent a constitutional taking of property), U.S. environmental law rarely provides allowances for the pursuit of just environmentalism.

In pointing this out, we are not arguing that if law and institutions had flexibility to consider costs and cost-distribution that they would naturally incline toward a more just environmentalism. Indeed, in areas in which agencies have some discretion, such as the enforcement of laws and the setting of fines, the weight of the evidence suggests that the exercise of that discretion often leads to a less just (rather than a more just)

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225. While the definition of "waters of the United States" from the Clean Water Act is much in dispute, regardless of how the term is defined, delineation requires looking at the physical characteristics of hydrology, soil, and plant life. *See, e.g.*, U.S. ARMY CORPS OF ENGINEERS, RECOGNIZING WETLANDS (1998), [http://www.sam.usace.army.mil/Portals/46/docs/regulatory/docs/recognizing\\_wetlands.pdf](http://www.sam.usace.army.mil/Portals/46/docs/regulatory/docs/recognizing_wetlands.pdf) [<http://perma.cc/S8ZV-PU3Z>].

226. 16 U.S.C. § 1539(e) (2012).

227. *See* Limitation on Section 9 Protections Applicable to Salmon and Steelhead Listed as Threatened under the Endangered Species Act (ESA), for Actions Under Tribal Resource Management Plans, 65 Fed. Reg. 42,481 (July 10, 2000) (to be codified at 50 C.F.R. § 223).

administration of the law.<sup>228</sup> Without a more specific and considered mandate about how that discretion should be exercised, it seems unlikely that discretion to consider costs would lead to more just results. Nonetheless, without at least some flexibility, in many instances the idea of pursuing justice when justice and environmentalism collide is completely off the table.

Moreover, it is not just the lack of flexibility in the administration of environmental law that makes thinking about just environmentalism difficult in the U.S. context; it is also the way that U.S. institutions are much more entrenched and siloed off than those institutions we find in the international context. As these situations illustrate, unless changed, U.S. federal institutions and law would not allow for the kind of creativity across policy boundaries that just environmentalism remedies might require.

Of course, the fact that U.S. environmental law and institutions are not very well designed to take into account just environmentalism does not mean that the problems of justice environmentalism go unnoticed. Indeed, as we have noted, a major theme of much of our political discourse criticizing environmental protection focuses explicitly on the ways environment protection can undermine job growth and livelihoods. Making consideration of the harms of environmental protection a part of environmental law—rather than just an objection that the “other side” always invokes—might leave more space for holistic and collaborative solutions that move both environmental protection and social justice forward. There is little doubt, however, that effectively addressing these concerns is likely to require legal and institutional reforms or, at least, much more inter-agency collaboration than has typically occurred.

## VI. CONCLUSION

Since the environmental justice movement emerged nearly four decades ago, we have generally conceived of environmental justice as finding ways to promote environmental protection while simultaneously helping society’s most vulnerable. While much of the rhetoric of anti-

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228. A classic environmental justice concern is the under-enforcement, or at least less aggressive enforcement, of environmental protection laws in low-income and minority neighborhoods. Fewer enforcement actions may be brought against violators and those enforcement actions may result in lower fines than for violations that occur in more affluent areas. *See, e.g.,* Faber, *supra* note 18, at 135.

environmentalism has articulated the ways that environmental protection produces social and economic harms, the environmental movement has resisted conceding that this is the case.

The time has now come, if it is not long overdue, for the environmental movement to grapple explicitly with those sets of cases where environmental protection and protecting society's most vulnerable, instead of going hand-in-hand, go head-to-head. This does not necessarily mean foregoing or even reducing environmental protection. It will almost certainly mean carefully considering these harms, attempting to avoid them, and often mitigating them when they cannot reasonably be avoided. Doing so will undoubtedly be difficult, but addressing these harms is necessary to the advent of a more just environmentalism and may also be the best hope for creating politics more receptive to environmental protection in the long run.